Supreme Court, U.S.
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No.——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

U.S. ANCHOR MFG., INC.
Petitioner,

v.

RULE INDUSTRIES, INC.,
TIE DOWN, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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140 pp

QUESTIONS PRESENTED

1. In an attempted monopolization case under Sherman Act section 2, does a determination that the defendant did not have a 50% or greater share of the relevant market — based upon an improper redefinition of the relevant market — preclude as a matter of law a finding of dangerous probability of monopolization, without regard to evidence that the relevant market was highly concentrated, that there were significant barriers to entry, that the defendant had the capacity to cross-subsidize predation from a closely-related product market which it controlled, and that eliminating the plaintiff as a competitor would leave the defendant with 78-89% or more of the relevant market?

2. Does establishing the existence of an illegal predatory price-fixing agreement under Sherman Act section 1 require establishing under a heightened standard of proof that in addition to agreeing on prices both parties had affirmative knowledge and a specific predatory intent that the agreed prices be at below-cost levels?

LIST OF PARTIES

The parties to the proceeding below were petitioner, U.S. Anchor Mfg., Inc.; counterclaim-defendant William Chapman, president of U.S. Anchor, who is not a petitioner here; and respondents, Rule Industries, Inc. and Tie Down, Inc.

Pursuant to Supreme Court Rule 29.1, the Court is advised that the petitioner does not have any parent companies or any subsidiaries that are not wholly-owned.

TABLE OF CONTENTS

page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' IMPOSITION OF A 50% MARKET SHARE REQUIREMENT FOR SECTION 2 ATTEMPTED MONOPOLIZATION CLAIMS 11

A. The Eleventh Circuit Held That Attempted Monopolization Cannot Be Established as a Matter of Law Unless the Defendant Has a Market Share of at Least 50% 11

B. Other Courts of Appeals Have Required a Realistic Assessment of *All* Relevant Facts In Determining Whether There is a Dangerous Probability of Monopolization 14

C. This Case Provides a Particularly Good Vehicle for the Court to Provide Needed Guidance on the Proper Evaluation of the Dangerous Probability of Monopolization 17

II. THE ELEVENTH CIRCUIT'S REVERSAL OF THE JURY'S SECTION ONE CONSPIRACY VERDICT WAS A MANIFEST AND FUNDAMENTAL ERROR WARRANTING SUPERVISION FROM THE COURT 18

CONCLUSION 22

APPENDIX

Opinion of the United States Court of Appeals for the Eleventh Circuit 1a

Order of the United States District Court for the Northern District of Georgia (on motions for summary judgment) 48a

Order of the United States District Court for the Northern District of Georgia (on motions for judgment notwithstanding the verdict and other motions) 74a

Order of the United States Court of Appeals for the Eleventh Circuit on Petition for Rehearing 100a

U.S. Anchor Trial Exhibit ("USTX") 467 (Rule and Tie Down pre-combination market shares) 102a

USTX 683 (MacKarvich memorandum) . . . 103a

USTX 68 (Letter from Tie Down to Rule) . 105a

Chart of Market Shares from Brief of Appellant Rule Industries 106a

Chart of Tie Down Selling Prices from U.S. Anchor's Petition for Rehearing 107a

TABLE OF AUTHORITIES

CASES

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) 20

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) 20

Broadway Delivery Corp. v. *United Parcel Service of America,* Inc., 651 F.2d 122 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) 17

Business Electronics Corp. v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988) 19

Domed Stadium Hotel v. *Holiday Inns*, 732 F.2d 480 (5th Cir. 1984) 14

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911) 20

Eastman Kodak Co. v. *Image Technical Services*, 112 S. Ct. 2072 (1992) 11, 18

International Distribution Centers, Inc. v. *Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987) 14, 15

Kearney & Trecker Corp. v. *Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971) 17

Kelco Disposal v. *Browning-Ferris Indus.*, 845 F.2d 404 (2d. Cir. 1988), *aff'd on other grounds*, 492 U.S. 257 (1989) 15

Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951) 13

McGahee v. *Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) 12

McLain v. *Real Estate Board of New Orleans*, 444 U.S. 232 (1980) 19

Palmer v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) 4, 21

Shoppin' Bag of Pueblo, Inc. v. *Dillon Cos.*, 783 F.2d 159 (10th Cir. 1986) 15

Spectrum Sports, Inc. v. *McQuillan*, 113 S. Ct. 884 (1993) 11, 12, 18

United States v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944) 19

United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) 19

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 19

United States v. *Trenton Potteries Co.*, 273 U.S. 392 (1927) 19

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 19

White & White, Inc. v. *American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983) 15

STATUTES

15 U.S.C. § 1 2

15 U.S.C. § 2 4

28 U.S.C. § 1254(1) 2

MISCELLANEOUS

ABA Antitrust Section, *Antitrust Law Developments* 265-66 (3d ed. 1992) 16

3 P. Areeda and D. Turner, *Antitrust Law* ¶ 835a at 346 (1978) 15, 16

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 7 F.3d 986 (11th Cir. 1993) and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a. The order of the United States District Court for the Northern District of Georgia denying respondents' motions for summary judgment is reported at 717 F. Supp. 1565, and is reproduced at Pet. App. 48a. The opinion of the United States District Court for the Northern District of Georgia denying motions for judgment notwithstanding the verdict and ruling on other motions, dated September 4, 1991, is not reported and is reproduced at Pet. App. 74a. The Order of the United States Court of Appeals for the Eleventh Circuit denying rehearing, dated January 7, 1994, is not reported and is reproduced at Pet. App. 100a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on November 23, 1993. An order denying petitioner's timely petition for rehearing was entered on January 7, 1994. On March 11, 1994, Associate Justice Anthony M. Kennedy signed an order extending the time for filing this petition to and including May 6, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine

not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This petition follows the Eleventh Circuit's reversal of a jury verdict for petitioner U.S. Anchor Mfg., Inc. ("U.S. Anchor") on Sherman Act section 2 attempted monopolization and section 1 and 2 conspiracy claims arising from respondents' anticompetitive scheme to dominate the recreational boat anchor market. The jury found that respondents had conspired to fix prices for their anchors at predatory levels and to monopolize, and that respondent Rule Industries, Inc. ("Rule") had individually engaged in predatory pricing, in order to drive U.S. Anchor out of the market, which would have left respondents with a 78-89% or greater market share. In reversing that verdict, the Eleventh Circuit held as a matter of law that, without regard to other market conditions, there could be no dangerous probability of success by an attempted monopolist unless it already had at least fifty percent of the market. The court of appeals also held as a matter of law that a "heightened standard" should be applied to the conspiracy claims, under which no conspiracy to fix prices could be shown unless *both* parties were aware that the prices, even though agreed upon, were set below cost.

This case involves the two sources of supply which together account for 78-89% or more of the domestic market for "fluke" style recreational boat anchors. Anchors and similar marine products are typically sold by suppliers to wholesale distributors, who in turn sell to smaller boat shops, marinas, and other retail dealers, who sell the products to consumer boat owners. Pet. App. 5a-6a. Within the general category of fluke anchors, there are four

product groups: (1) expensive premium anchors, (2) the well-known "Danforth Standard" brand of anchors, (3) functionally interchangeable "generic" versions of the Danforth Standard, and (4) inexpensive economy anchors used in lake boating. Pet. App. 6a and 22a.

Respondent Rule is a diversified company headquartered in Massachusetts, which sells an assortment of hardware, automotive, and marine supplies. Pet. App. 6a. Respondent Tie Down, Inc. ("Tie Down") is a smaller Georgia company that in the 1970's entered the market as a manufacturer of generic and economy fluke anchors sold under the brand name "Hooker." *Id.* The parties' financial statements submitted at trial show Rule's and Tie Down's combined total sales for their 1987 fiscal years were $46,33-9,000, as compared to $993,000 for U.S. Anchor. Rule first entered the fluke anchor market in 1983, when it acquired the rights to market the Danforth brand.[1]

In 1985, Rule entered into a combination with Tie Down, by which Rule obtained the Hooker trademark and certain related assets and inventory from Tie Down, along with exclusive rights to Tie Down's line of anchors. As part of this agreement, Tie Down agreed to begin manufacturing Danforth anchors for Rule. The agreement also contained a covenant under which Tie Down would not compete with Rule.[2] Since 1985, Tie Down's role in the anchor market has been as a manufacturer for Rule. *See* Pet App. 6a-7a. Prior to their agreement, Rule and Tie Down were the only

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[1] From 1983 to 1985, Rule had the Danforth anchors manufactured for it by the Jacquith Company of New York. Pet. App. 6a.

[2] As a horizontal agreement between then-competitors by which one of them exited the anchor market in favor of the other, the 1985 agreement between Rule and Tie Down bears a strong resemblance to the agreement that was summarily condemned as a section 1 violation by the Court in *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

U.S. manufacturers of boat anchors doing business on a national basis, and together accounted for 90.5% of the dollar volume of boat anchor sales in the selling season immediately prior to the season for which they first undertook combined operations. Pet. App. 84a and 102a.

After Rule and Tie Down entered their new relationship, Tie Down's former president, William Chapman, formed U.S. Anchor as a competing anchor supplier. U.S. Anchor began manufacturing and distributing anchors under the "Sentinel" brand name starting with the 1985-86 marine supplies selling season, which was also the first full selling season for the combined Rule/Tie Down operation. Pet. App. 7a. Following U.S. Anchor's publication of its first price list in August 1985, Rule published prices in September that were 11 to 18 percent higher than U.S. Anchor's. After U.S. Anchor received substantial orders from Rule customers, however, Rule dropped its prices in October by 20%, cutting its prices 6 to 12 percent below U.S. Anchor's. U.S. Anchor then matched Rule's lower prices. *Id.*

At this point, Tie Down's president, Charles MacKarvich, sent a written report to Rule proposing that Rule set new prices levels that would force U.S. Anchor to incur losses. *See* Pet. App. 7a-8a and 103a. MacKarvich estimated U.S. Anchor's costs of production and hypothetical projected sales for a twelve-month period. He concluded that if Rule would agree to further price cuts and extend more generous credit terms to its customers that U.S. Anchor could not match, then U.S. Anchor would be forced to make even greater price concessions. *Id.* Based on these projections, MacKarvich predicted that these lower prices would force U.S. Anchor to incur negative cash flow and a net loss for 1985-86. *Id.* Rule set its prices at the levels proposed in MacKarvich's report in November 1985. *Id.* Tie Down cemented its commitment to Rule's predatory pricing by reducing the price of the anchors it supplied to Rule. Pet. App. 105a.

U.S. Anchor filed suit against Rule and Tie Down in November 1986. The complaint alleged that Rule had attempted to monopolize the fluke anchor market in violation of section 2 of the Sherman Act beginning in October 1985 by predatory pricing. The suit further alleged that Rule and Tie Down had conspired to restrain trade in violation of section 1 of the Sherman Act and conspired to attain and retain a monopoly in violation of section 2 by agreeing to charge predatory prices, also beginning in October 1985.[3] Pet. App. 10a-11a.

The district court denied cross-motions for summary judgment, and the case was tried to a jury. After a trial lasting seven weeks, the jury found Rule liable for attempted monopolization, and found Rule and Tie Down jointly liable for conspiracy in restraint of trade and conspiracy to monopolize. The jury set damages on each of the three claims at $1,638,028, which the court trebled to $4,914,084. The district court denied Tie Down's and Rule's motions for judgment notwithstanding the verdict and for a new trial on damages issues. Rule and Tie Down appealed.[4] Pet. App. 12a.

On appeal, Rule and Tie Down raised numerous objections to the conclusions reached by the jury. Notably absent was any contention that the jury had been improperly instructed on the law. Rule and Tie Down instead challenged the sufficiency of the evidence to support several aspects of the jury's verdict. Relevant here are their conten-

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[3] U.S. Anchor also alleged that Rule had engaged in an illegal tying arrangement involving its new, patented, "Deepset" anchors, and that Rule and Tie Down had violated Georgia law against conspiracies to restrain trade. These claims are not relevant to this petition.

[4] U.S. Anchor cross-appealed from the district court's dismissal of its state law claims, resulting in a certification of state law questions by the Eleventh Circuit to the Georgia Supreme Court that is not relevant to this petition. *See* Pet. App. at 38a *et seq.*

tions that (1) there was insufficient evidence to support the finding of a dangerous probability of success on the attempted monopolization claim, and (2) there was insufficient evidence of conspiracy to support U.S. Anchor's section 1 and section 2 conspiracy claims.

The Eleventh Circuit first addressed the jury's finding of attempted monopolization. Rule sought reversal based on its view of the evidence (a) on barriers to entry into the relevant market, and (b) relating to U.S. Anchor's purported performance. Pet. App. 13a-14a. The court of appeals, however, undertook an extensive analysis of the appropriate definition of the relevant market, even though Rule had not argued the point. Pet. App. 18a. The major questions the court addressed were whether Danforth Standard anchors should be included in the relevant market and whether market share should be measured in dollars as opposed to units. If the jury credited — which apparently it did — the evidence that supported including Danforth Standard anchors in the market and measuring the market in dollars, it would have found that Rule had well over half of the relevant market. The court of appeals held as a matter of law, however, that market share must be measured in units, and that no reasonable jury could have included Danforth Standards in the relevant market, even though the court of appeals acknowledged that those anchors were "functionally interchangeable" with the other anchors in the market, and that an increase in the spread between the prices of the higher-priced Danforth Standards and their equivalents led to decreased sales of the Danforths. Pet. App. 20a *et seq.*

The Eleventh Circuit redefined the market in this way notwithstanding settled law that market definition is an issue of fact for the jury. Even more important for this Court's review of the court of appeals' reversal of the jury's ultimate verdict is the undisputed fact that under *any* definition of the relevant market, it was essentially a duopoly. As revealed in a chart showing various measures of market share introduced by respondent Rule, the combined market share of

U.S. Anchor and Rule/Tie Down during 1985/86 was between 67.6% and 84.6%. Pet. App. 106a. The average combined market share of U.S. Anchor and Rule/Tie Down between 1985 and 1990 was between 78% and 88.6%. *Id.*

Moreover, the district court found that U.S. Anchor had submitted evidence showing that Rule had a 90% market share prior to the first selling season in which U.S. Anchor was a market participant.[5] Pet. App. 84a and 102a. The District Court also expressly found that: "there was evidence before the jury that Rule had the power to achieve a monopoly position in the market"; that there was "ample evidence in the record to support the jury's implicit finding that entry barriers exist in the generic anchor market"; that "ample evidence was presented to the jury from which it could find that Rule possessed the power to engage in predatory pricing"; that "ample evidence exists for the jury to define the relevant market and to determine the defendant's market share therein"; and that the evidence showed that Rule priced below its average variable cost. Pet. App. 82a, 83a, 84a, 85a, and 85a-86a.

The Eleventh Circuit expressly or tacitly acknowledged the existence of issues of fact bearing on these critical findings, including whether respondents' sales were below the appropriate measure of costs, Pet. App. 13a and 34a-35a; the presence of barriers to entry into the market, Pet. App. 13a; the significance of competitive advantages conveyed to Rule by the depth of its product line, Pet. App. 33a, including the ability of Rule to charge prices significantly above competitive levels for its Danforth line, Pet. App. 8a, 23a, 26a and 27a; and the highly concentrated nature of the industry, in which customers had few sources

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[5] By contrast, the court of appeals concluded that it was "undisputed" that Rule and Tie Down had a combined share of only 61.5% prior to the entry of U.S. Anchor — but cited in support only the *defendants'* evidence! Pet. App. 32a-33a.

of supply, Pet. App. 33a. The court of appeals did not, however, address the merits of any of these issues, which thus must be taken as having been decided by the jury in favor of U.S. Anchor.

Having determined what market definition it would apply, the court of appeals reversed the jury's verdict on the attempted monopolization claim. The Eleventh Circuit held as a matter of law that U.S. Anchor could not show the requisite "dangerous probability" of the defendants' acquiring a monopoly. The sole basis cited by the court of appeals for this holding was that Rule/Tie Down did not possess 50% of the relevant market during the relevant time period. Pet. App. 34a. The court held that absent a showing that respondents held at least a 50% market share, U.S. Anchor's verdict could not stand "as a matter of law." *Id.*

Turning to the jury's two conspiracy verdicts against Rule and Tie Down under both Sherman Act sections 1 and 2, the court of appeals again reversed. While acknowledging both the evidence of pricing by Rule in accordance with Tie Down's MacKarvich report as described above, and Rule's intent to achieve an unlawful objective by predatory means, Pet. App. 36a, the court of appeals held that a "heightened standard of proof" must be applied to the conspiracy claims, sufficient to "exclude the possibility that defendants acted independently *or legitimately*." *Id.* (emphasis added).

The Eleventh Circuit held that the MacKarvich report did not necessarily show that Tie Down intended that the agreed prices be predatory, only that they be set low enough to cause U.S. Anchor to suffer losses. Pet. App. 37a. The court also stated that Tie Down had no knowledge of Rule's costs other than the price it paid Tie Down for anchors. *Id.* On this basis, despite accepting that prices were set by Rule in accordance with Tie Down's plan and were in fact predatory, and that Rule intended predation, and notwithstanding that Rule and Tie Down were obviously participating in an ongoing combination by virtue of their 1985

contract, the court of appeals held that there was no conspiracy to restrain trade because there was insufficient evidence to show that Tie Down intended that the agreed prices be at levels below Rule's costs.[6] Pet. App. 38a.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals represents a substantial departure from existing law on both the standards for attempted monopolization and the *per se* illegality of vertical price fixing agreements. The Court should grant certiorari in order to: (1) provide essential guidance on the proper evaluation of the "dangerous probability of success" element in section 2 attempted monopolization cases in light of the conflict between the Eleventh Circuit's rigid 50% market share requirement and the approach of other courts of appeals; and (2) correct the Eleventh Circuit's manifestly incorrect analysis on the conspiracy verdict, which threatens to undermine the Court's long-established rule that price-fixing agreements, whether horizontal or vertical, are *per se* illegal. Without guidance from the Court, the court of appeals' erroneous reasoning will raise unduly high thresholds to meritorious antitrust claims, whether in private antitrust actions or government enforcement efforts.

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[6] In fact, the record plainly showed that Tie Down proposed selling prices to Rule that were *below* the prices that Rule paid to Tie Down for the anchors (plus shipping and labelling charges) in the first place. *See* discussion at pp. 19-20 *infra*. The court of appeals simply refused to acknowledge this evidence, and made no mention of it in its opinion.

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' IMPOSITION OF A 50% MARKET SHARE REQUIREMENT FOR SECTION 2 ATTEMPTED MONOPOLIZATION CLAIMS

Recent cases from this Court, most notably *Eastman Kodak Co.* v. *Image Technical Services*, 112 S. Ct. 2072 (1992), teach that antitrust analysis must not rely upon economic theory to the exclusion of actual market facts. Here the Eleventh Circuit applied a 50% market share requirement so rigid that it resulted in reversal of the jury's verdict for U.S. Anchor without regard to *any* other fact — and notwithstanding extensive record evidence of a number of facts bearing on the existence of market power. This approach conflicts with the broader, less formalistic and more realistic analysis that has been employed by other courts of appeals, requiring this Court's attention.

A. The Eleventh Circuit Held That Attempted Monopolization Cannot Be Established as a Matter of Law Unless the Defendant Has a Market Share of at Least 50%

The court of appeals properly recognized that the "three essential elements of a claim of attempted monopolization under section 2 of the Sherman Act" are (1) a specific intent to achieve monopoly power, (2) anticompetitive conduct, and (3) a dangerous probability of successful monopolization. Pet. App. 16a, *citing Spectrum Sports, Inc.* v. *McQuillan*, 113 S. Ct. 884 (1993). The Eleventh Circuit reversed the jury's finding of attempted monopolization by focusing on the third element, but did so by imposing a bright-line requirement that the defendant possess at least 50% of the relevant market at the beginning of its predatory conduct:

> Accordingly, because Rule possessed less than 50% of the market at the time the alleged pre-

> dation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success in October 1985 as a matter of law.

Pet. App. 34a.

In the introductory portion of its attempted monopolization analysis, the court of appeals noted precedent from the Eleventh Circuit stating that "several factors may be relevant to whether a particular market share evinces a dangerous probability of success." Pet. App. 30a (*citing McGahee* v. *Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989)). Those other factors — the potential for "entry by new firms," the "number and size of alleged victims," and the like, Pet. App. 17a and 30a — were all factors for which the court acknowledged the existence of record evidence but which it declined to address. These factors must accordingly be taken as having been assessed by the jury in U.S. Anchor's favor. Moreover, the district court expressly found, in denying Rule's motion for judgment notwithstanding the verdict, that "[w]hile market share is a good indicator of ability to engage in predatory pricing . . ., market share is not the only indicator of a business' ability to predatorily price." Pet. App. 83a. Nonetheless, the court of appeals' analysis was limited solely to a discussion of defendant Rule's market share. Pet. App. 34a.

Nothing in *Spectrum Sports* or the authorities that decision relies on requires such a rule, and the failure of the Eleventh Circuit's analysis to account for relevant market facts is evident from its application here of its 50% market share test. The record presented at trial contained extensive evidence from which the jury — whose instructions were not challenged on appeal — could have found a dangerous probability of successful monopolization. Under the court of appeals' own market definition analysis, for example, it found that Rule held a monopoly over a separate market for

Danforth anchors, and could consistently sell Danforths at very high prices to a loyal customer base, which valued its "mystique." Pet. App. 26a-27a. Yet notwithstanding the jury's verdict for U.S. Anchor, the court of appeals ignored the obvious ability this gave Rule to cross-subsidize predatory prices on its non-Danforth anchors.

Equally important, the court of appeals excluded from its assessment of the dangerous probability of monopolization the critical fact that even the defendants' evidence showed that U.S. Anchor and Rule/Tie Down together accounted, on average, for at least *78% to 88%* of the relevant market, Pet. App. 106a, and that there was evidence from which the jury could have concluded that there were significant barriers to entry into the relevant market. Indeed, the court of appeals acknowledged that "the anchor industry was highly concentrated and customers had few alternative sources of supply . . . ." Pet. App. 33a. Such a situation, in which the predator and its victim together dominate a duopoly market, presents a market reality for which the Eleventh Circuit's rigid 50% requirement cannot account.

Nowhere does the court of appeals explain why a bright-line market share test should be applied retroactively to purported shares at the beginning of the predatory conduct, without any effort to project the likely market share consequences should the predatory scheme prove successful. If the predator firm, even if holding less than 50% of the market, succeeds in driving its competitor from such a highly concentrated market in the manner outlined in the MacKarvich memo, the predator will perforce be left as a monopolist. *Cf. Lorain Journal Co.* v. *United States*, 342 U.S. 143, 150 (1951) (finding that defendant had violated § 2 where "[a]ttainment of that sought-for elimination [of a radio station rival for advertising] would automatically restore to the publisher of the [defendant newspaper] its substantial monopoly in [the relevant market] of the mass dissemination of all news and advertising, interstate and national, as well as local.").

In short, there was record evidence before the jury on a number of factors that supported its finding of a dangerous probability of success. Those included factors that the court of appeals declined to address on the merits, and thus was required to assume in U.S. Anchor's favor. The exclusion of the other factual and economic considerations from the analysis establishes the unprecedented rigidity of the 50% requirement that the court of appeals seeks to impose.

B. Other Courts of Appeals Have Required a Realistic Assessment of *All* Relevant Facts In Determining Whether There is a Dangerous Probability of Monopolization

The Eleventh Circuit's analysis is squarely at odds with decisions from several other courts of appeals. Instead of limiting their analysis to a numerical evaluation of the defendant's historic market share, other courts properly consider the range of factors that can indicate a dangerous probability that a defendant will succeed in monopolizing a market. Numerous cases illustrate the appropriate, fact-based approach, providing a stark contrast to the Eleventh Circuit's analysis here.

For example, in *Domed Stadium Hotel* v. *Holiday Inns*, 732 F.2d 480, 490 (5th Cir. 1984), the court recognized that "a [market] share of less than the fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present." Similarly, the Second Circuit stated in *International Distribution Centers, Inc.* v. *Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir. 1987) that

> market share analysis, while essential, is not necessarily determinative in the calculation of monopoly power under this standard. Other

> market characteristics must also be considered in determining whether a given firm has monopoly power or has a dangerous probability of acquiring monopoly power. . . . Among these characteristics are the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand.

See also Kelco Disposal v. *Browning-Ferris Indus.*, 845 F.2d 404 (2d. Cir. 1988), *aff'd on other grounds*, 492 U.S. 257 (1989) (recognizing the factors listed in *Walsh Trucking*).

Other cases further illustrate the clash between the Eleventh Circuit's approach and that traditionally taken by other courts. *See, e.g., Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986) (requiring "assessment based on as much information as is available" on factors such as the "number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, consumer sensitivity to change in prices, innovations or developments in the market, whether the defendant is a multimarket firm, as well as other evidence"); *White & White, Inc.* v. *American Hospital Supply Corp.*, 723 F.2d 495, 507 (6th Cir. 1983) (determination of market power "mandates a comparison of the defendant's size, performance and policies to that of other competitors *and* an analysis of the market structure.").

Professors Areeda and Turner, in their seminal treatise, make clear that the dangerous probability element "does not require significant pre-existing market power, but only that the defendant's market position, when coupled with the challenged conduct, may result in monopoly." 3 P. Areeda and D. Turner, *Antitrust Law* ¶ 835a at 346 (1978). In reviewing the types of conduct that would justify application of section 2's attempt clause, Professors Areeda and Turner directly address the conduct at issue here:

> Predatory pricing is a particularly good example [of conduct that would satisfy the above test], for such pricing is itself proof that the firm, if not already possessing a degree of market power, anticipates obtaining it. Otherwise it would not be able to recoup its losses by monopoly profits earned after the target firms are extinguished.

Id. ¶ 836b at 353. This reasoning is particularly cogent here, since the Eleventh Circuit made no finding that the evidence of below cost sales was in any way insufficient.

Likewise, the ABA Antitrust Section's compilation and summary of antitrust case law states that in attempted monopolization cases,

> [a]s in the monopolization context, however, market shares do not tell the entire story. Other relevant factors include the strength and capacity of existing and potential competition, barriers to entry, the concentration of the market, the trend toward greater or lesser concentration, the nature of the defendant's anticompetitive conduct, and the elasticity of consumer demand. Thus, market shares not reaching the level required for actual monopolization may support a claim for attempted monopolization if an evaluation of these or other market characteristics demonstrates that a dangerous probability of monopolization exists.

ABA Antitrust Section, *Antitrust Law Developments* 265-66 (3d ed. 1992).

The teaching of these cases and authorities is that in the real world of commerce, determining whether there is a dangerous probability of monopolization requires meaningful

analysis of a range of relevant factors, not just market shares. None of those additional factors was examined by the Eleventh Circuit. Indeed, its 50% market share threshold for finding dangerous probability of successful monopolization is a level that other courts have recognized as potentially sufficient to establish *actual monopolization*. *See, e.g., Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122, 130 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) (trial court's jury instruction precluding a finding of monopoly power if the defendant's market share was less than 50% legally erroneous); *see also Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7th Cir. 1971) (Stevens, J.) (firm with 30% of market "clearly" was able "to make a serious attempt to acquire monopoly status").

The Eleventh Circuit's 50% market share test elevates a relevant fact to an ultimate conclusion, to the exclusion of factors that other circuits have properly recognized may show a dangerous probability of attempted monopolization, and without adequately recognizing that the "ultimate concern is the firm's actual or threatened impact on competition in the relevant market." *Kearney & Trecker Corp.*, 452 F.2d at 598.

C. This Case Provides a Particularly Good Vehicle for the Court to Provide Needed Guidance on the Proper Evaluation of the Dangerous Probability of Monopolization

Because the court of appeals acknowledged other relevant factors but excluded them from its analysis, the question of the propriety of a 50% market share requirement is cleanly presented. The court of appeals reversed the verdict of a properly instructed jury on this basis by excluding from its consideration evidence on barriers to entry, the existence of a duopoly market in which the defendant could cross-subsidize predation from the profits of its other product lines, and the like. Unlike cases from other courts, which

consider market share along with numerous other factors, the Eleventh Circuit's decision thus isolates the market share issue and provides a particularly good opportunity for the Court to provide guidance on the role of market share in section 2 attempted monopolization claims.

There can be little doubt that the jurisprudence of antitrust has, over the last decade or so, benefitted greatly from an injection of increasingly sophisticated economic analysis. But the alluring tidiness of economic theory should not distract courts from the complexities and imperfections of markets, nor from the facts in the cases before them. As the Court warned in the *Kodak* case, "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." 112 S. Ct. at 2082. The elevation of legal presumptions over market realities is exactly what happened here, and why the Court should grant certiorari. Having established in *Spectrum Sports* that "dangerous probability of success" is an essential element of an attempted monopolization claim, the court should now provide guidance on the application of this element. Without such guidance, the Eleventh Circuit's decision threatens to undermine the effectiveness of section 2 of the Sherman Act in policing anticompetitive conduct.

II. THE ELEVENTH CIRCUIT'S REVERSAL OF THE JURY'S SECTION ONE CONSPIRACY VERDICT WAS A MANIFEST AND FUNDAMENTAL ERROR WARRANTING SUPERVISION FROM THE COURT

The Eleventh Circuit's reversal of the jury's verdict on the conspiracy claims, which were brought under both section 1 and section 2 of the Sherman Act, is based on an egregious and fundamental flaw. There is clear record evidence — indeed documentary proof recognized by the court of appeals — that Rule and Tie Down agreed to set prices on the basis of the MacKarvich memo. Pet. App. 8a. The court of appeals further assumed for purposes of its

analysis that the price levels agreed to were predatory. Pet. App. 36a. Nonetheless, the court, adopting a "heightened standard" of scrutiny, held that no violation had occurred because Tie Down did not know the prices set were predatory. Pet. App. 36a and 38a.

This holding completely disregards the fundamental rule that *all* agreements to set price are *per se* illegal, without regard to what the parties know or believe about the appropriateness of the price level selected. Prices "are fixed because they are agreed upon." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940). Few things are more well-established in antitrust law than the principle that: "Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the [Sherman] Act." *Id.* at 224.

The court of appeals was willing to acknowledge that the prices resulting from the agreement were anticompetitive, but effectively ignored this Court's holdings on several occasions that, in a civil action under section 1 "liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect." *E.g., McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 243 (1980); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 (1978). The Eleventh Circuit's injection of intent as a prerequisite to finding a price-fixing agreement illegal is nothing less than a return to the notion, rejected since the decision in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927), that the level of agreed-upon prices is relevant to the legality of the agreement. It is all but a truism of antitrust that an agreement upon price is illegal without regard to whether the defendants believed the resulting price was reasonable. *See, e.g., Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 720, 724 (1988); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707

(1944); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

The best illustration of the error of the court's section 1 conspiracy analysis is this Court's decision in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990). In that case, the Court addressed a vertical maximum price-fixing agreement and reaffirmed the fundamental principle that agreements between independent parties on price, whether they are vertical or horizontal, and whether the agreement is to set higher *or* lower prices, are *per se* violations of section 1. *Id.* at 335-336 (*citing Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968)). The major holding of the case was that competitors ordinarily suffered no "anti-trust injury" from vertical maximum price agreements — *except* in the case of predatory pricing. *Id.* at 339-340. Under *Atlantic Richfield*, it is plain both that the agreement on price between Rule and Tie Down was illegal, and that U.S. Anchor can maintain a section 1 claim for this violation.

Finally, petitioner must point out that the court of appeals' conclusion was manifestly insupportable even on its own terms. U.S. Anchor submitted substantial evidence — not addressed by the court of appeals — which demonstrated that the Rule selling prices Tie Down proposed in the MacKarvich memo were themselves *below* the selling price *plus* associated charges that Tie Down charged Rule. Tie Down charged $.055 per pound in "handling charges" and $.11 per anchor for labeling. If these charges are added to the Tie Down selling price, it is evident that the Rule selling price proposed in the MacKarvich memo for seven of the twelve anchors is below the amount Tie Down was charging for those anchors in the first place. As to two of the anchors, the proposed Rule selling price was below Tie Down's price to Rule even without the handling and labeling charges. Of course, after paying the full cost of the anchors, Rule would also incur marketing and distribution costs. The relevant figures from the trial evidence as summarized in

U.S. Anchor's petition for rehearing to the Eleventh Circuit are reproduced at Pet. App. 107a. In its rush to reverse the jury's verdict, the Eleventh Circuit simply ignored irrefutable evidence that Tie Down *did* know it was proposing a predatory price agreement.

In all candor, the flaws in the court of appeals' analysis of the conspiracy counts are so evident, and the legal principles so well established, that they do not merit plenary review by the Court. This Court should, however, correct the Eleventh Circuit's fundamental error in conjunction with its review of the important attempted monopolization issue set forth above. Alternatively, the Court should consider summary reversal. Cf. *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (summarily reversing Eleventh Circuit's erroneous imposition of a heightened "explicit agreement" requirement on section 1 price fixing allegations). At a minimum, the Court should call for the views of the Solicitor General on this issue. In *Palmer*, the Court had the benefit of the views of the United States concerning the effects of the decision below on its civil and criminal enforcement efforts prior to summarily reversing. This information might prove equally valuable to the Court here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 6, 1994

Filed November 23, 1993

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8854

U.S. ANCHOR MFG., INC., PLAINTIFF,
COUNTERCLAIM DEFENDANT, APPELLEE,
CROSS-APPELLANT,

v.

RULE INDUSTRIES, INC., DEFENDANT-
APPELLANT, CROSS-APPELLEE,

TIE DOWN, INC.,
A/K/A TIE DOWN ENGINEERING, INC.,
DEFENDANT, COUNTERCLAIM PLAINTIFF,
APPELLANT, CROSS-APPELLEE,

WILLIAM CHAPMAN, COUNTERCLAIM
DEFENDANT.

On Appeal from the United States District Court
for the Northern District of Georgia

(1:86-cv-2447-JTC)

Anchor manufacturer brought action against competitor and distributor alleging violation of antitrust law and tortious interference with business relationships in violation of Georgia law. The United States District Court for the Northern District of Georgia No. 1:86-cv-2447-JTC, Jack T. Camp, J., imposed civil liability for alleged predatory pricing. Defendants appealed. The Court of Appeals, Dubina, Circuit Judge, held that: (1) defendants could not be held liable for antitrust violations in the absence of showing that they had dangerous probability of success in monopolization; (2) distributor could not be held liable for conspiracy; and (3) pendent jurisdiction would be exercised over Georgia claim.

Reversed and rendered in part and questions certified.

Before: COX and DUBINA
Circuit Judges

and GODBOLD,
Senior Circuit Judge

(Filed November 23, 1993)

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TABLE OF CONTENTS

PAGE

I. FACTS . . . . . [5a]

II. PROCEDURAL HISTORY . . . . . [10a]

III. CONTENTIONS OF THE PARTIES . . . . [13a]

IV. STANDARD OF REVIEW . . . . . [15a]

V. ATTEMPTED MONOPOLIZATION . . . . [16a]

A. Dangerous Probability of Success . . [16a]

1. Defining the Market . . . . . [20a]
2. Measuring Power in the Market . [29a]
3. Recoupment . . . . . [34a]

B. Anticompetitive Conduct, Specific Intent and Damages . . . . . [34a]

VI. CONSPIRACY . . . . . [35a]

VII. CLAIMS UNDER GEORGIA LAW . . . . . [38a]

VIII. CONCLUSION . . . . . [47a]

OPINION OF THE COURT

DUBINA, *Circuit Judge.*

This is an appeal from a jury verdict imposing civil liability for alleged predatory pricing in violation of the antitrust laws. More specifically, appellants Rule Industries, Inc. ("Rule") and Tie Down Engineering, Inc. ("Tie Down"), defendants below, appeal the district court's denial of their motions for judgment notwithstanding the verdict on claims by U.S. Anchor Manufacturing, Inc. ("U.S. Anchor") that Rule and Tie Down attempted and conspired to monopolize the United States market for light weight fluke-style anchors for small boats by means of below-cost pricing intended to drive out competition. U.S. Anchor cross-appeals the district court's order of a directed verdict on its state law claims arising from the same allegations. We reverse the denial of defendants' motions concerning the federal claims. With respect to the state law claims, we certify the dispositive issues for authoritative resolution by the Supreme Court of Georgia.

I. FACTS

This case involves several manufacturers and suppliers of light weight anchors for ultimate retail purchase by owners of recreational boats and small commercial fishing craft. As the district court observed in denying cross-motions for summary judgment,

> [a]nchors and other marine industry products are generally sold by suppliers to wholesale

> distributors, who in turn sell the anchors to boat dealers, marinas, and other retailers for ultimate resale to the consumer, the boat owner. The supplier may either manufacture its own anchors, as does U.S. Anchor, or purchase them from another domestic manufacturer, as [Rule] does from Tie Down, or import them from abroad.

U.S. Anchor Mfg. v. Rule Indus., 717 F. Supp. 1565, 1568 (N.D. Ga. 1989).

Within the general category of fluke anchors are four distinct product groups recognized in the industry: (1) expensive premium anchors, (2) the "Danforth Standard" brand line of anchors sold only by Rule, (3) so-called "generic" versions of the Danforth Standard, and (4) inexpensive economy anchors used primarily for lake boating.

Rule is a diversified Massachusetts firm that sells an assortment of marine, hardware and automotive products to wholesale distributors. It entered the fluke anchor industry in 1983 when it obtained the rights to sell the Danforth brand line of anchors. Prior to 1985, Danforth anchors were manufactured for Rule exclusively by the Jacquith Company ("Jacquith") in New York. Tie Down is a smaller manufacturing firm in Georgia that began selling generic and economy fluke anchors in the late 1970s under the "Hooker" brand name. In May 1985 Rule obtained the Hooker trademark and the exclusive right to purchase and distribute Tie Down's anchor production in a transaction that U.S. Anchor has characterized as a "merger." After it sold the right to market its own anchors, Tie Down agreed to manufacture both generic/economy and Danforth brand

anchors for Rule. Tie Down's only role in the fluke anchor industry since 1985 has been as one of Rule's suppliers.

U.S. Anchor is a Georgia company founded in 1985 by William Chapman ("Chapman"), the immediate past president of Tie Down whose responsibilities there had recently ended. U.S. Anchor both manufactures and distributes generic and economy fluke anchors under the "Sentinel" brand name. Between August 1985 when it first sent out price lists and December 31, 1990, its market share increased to between 45 and 68%, depending on how the relevant product market is defined and measured.

Shortly after U.S. anchor entered the market in August 1985, on the eve of the 1985-86 marine products season,[1] Rule and U.S. Anchor engaged in a price war. Following publication of U.S. Anchor's August price list, Rule published prices in September that were approximately 11 to 18% higher than U.S. Anchor's. Thus, U.S. Anchor's prices were 10 to 15% lower than Rule's. (R30-27; *compare* USTX 343 *with* USTX 345.)[2] In October, after U.S. Anchor had received substantial orders from Rule customers, Rule cut its prices by 20%, *i.e.*, to levels 6 to 12% below U.S. Anchor's August prices (R49-28; RTX 584.) U.S. Anchor then matched Rule's October prices. In a written report to Rule, USTX 683, Tie Down's president Charles MacKarvich ("MacKarvich") estimated U.S. Anchor's costs of production and hypothetical projected sales for a twelve-month period. He theorized that if Rule lowered its prices further and offered extended credit terms

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[1] The annual marine products selling season begins each September with a trade show.

[2] U.S. Anchor's trial exhibits will be cited as "USTX__," Rule's trial exhibits as "RTX__" and Tie Down's trial exhibits as "TDTX__".

to customers, U.S. Anchor would be forced to adopt even more attractive terms in order to compete. From his estimates of cash flow and net revenue derived from these cost and sales projections, he predicted that such terms would subject U.S. Anchor to a negative cash flow and an actual net loss over the 1985-86 marketing year. Rule implemented price reductions consistent with MacKarvich's report in November 1985. In December, U.S. Anchor merely matched Rule's prices and did not attempt to undercut them. (R30-39-40, USTX 351, 353, 543.) U.S. Anchor contends that Rule's first price cut in October was predatory and that all subsequent sales at or below that level were also predatory.

After the pricing conduct at issue in this case began, distributors' prices for generic brands in the smaller, popular sizes ranged between $3 and $14 depending on weight, and prices for Danforths were spread 50 to 96% higher.[3] Among the more expensive, larger anchors the spread between Danforth and generic brands was even greater. Excluding premium anchors,[4] annual unit sales of fluke

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[3] (USTX 372 (Rule's 1989-90 price list; 50.4 to 96.2% spread); USTX 368 (Rule's 1988-89 price list; 49.7 to 96.2% spread); USTX 362 (Rule's 1987-88 price list; 73.4 to 91.7% spread); USTX 355 (Rule's 1986-87 price list; 61.0 to 76.1% spread); *see also* USTX 371 (U.S. Anchor's 1989-90 price list); USTX 367 (U.S. Anchor's 1988-89 price list); USTX 365 (U.S. Anchor's 1987-88 price list).) U.S. Anchor repeatedly opened the marine season with prices higher than Rule's only to reduce its prices when Rule failed to follow U.S. Anchor's pricing strategy.

[4] The parties have treated this appeal as though premium fluke anchors were irrelevant. They have also ignored other types of anchors designed for holding on different bottom conditions (fluke anchors are most useful on sandy bottoms and least effective in gripping grassy bottoms). We do the same.

anchors in the United States during the time relevant to this case was varied from 232,000 to 347,000. (USTX 479.)

At trial the parties noted differing possible measures of Rule's share of the relevant product market after the acquisition of Tie Down's anchor line in May 1985, four months before the close of the 1984-85 marine season at the end of August. This dispute encompassed two aspects of market share: whether to define the product market as including the high priced Danforth anchors or only the less expensive generic and economy models, and whether to measure market shares in terms of unit sales or dollar revenues. Including the Danforth line and measuring market shares in revenue, U.S. Anchor asserts that Rule and Tie Down together controlled 90.5% of the fluke anchor market during the 1984-85 season, the last year before Rule's alleged predation began and the last year before the merger with Tie Down, and that Rule possessed 60.0% of the market during the 1985-86 selling year. (USTX 467.) Using Rule's most favorable calculation, which measures share in units and excludes Danforths from the market, Rule contends that the combined Rule/Tie Down market share in 1984-85 was only 61.5%, (RTX 674), and that Rule's aggregate 1985-86 share was 30.1%, (*id.:* RTX 675 at 1).[5]

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[5] Although neither party adduced direct evidence of the combined Rule/Tie Down unit market share on 1984-85 with Danforths included, the jury must have concluded that the firms' combined unit share for that season with the higher-priced anchors included was somewhat greater than the 61.5% unit share they garnered in the non-Danforth market because only Rule marketed the Danforth line. U.S. Anchor's USTX 467 indicates that Rule itself had no 1984-85 revenues in the non-Danforth market. But Rule's RTX 674, which appears to represent the non-Danforth unit market (*compare* RTX 674, col. 1985-86 *with* RTX 675 at 1, rows 1985-86), shows Rule with 12.6% of that market in 1984-85. We assume that RTX 674 attributes to Rule the non-Danforth

(continued...)

Rule also submitted evidence that its 1985-86 unit market share, including Danforths, was 43.1%. (RTX 675 at 1.) Notably, all of these figures encompass an entire season and none of them attempts to pinpoint Rule's share at the exact date when the alleged predation began in October 1985, several months after U.S. Anchor entered the market. The evidence shows, and the parties agree, that the Rule/Tie Down market share consistently decreased after August 1985 when U.S. Anchor first began to solicit orders. The parties also agree that the relevant geographic market was the United States.

II. PROCEDURAL HISTORY

In November 1985 Rule filed suit against U.S. Anchor for various violations of state and federal law not involving predatory pricing. The suit was settled on March 19, 1986, when U.S. Anchor and Rule executed an agreement releasing each other from liability for all events occurring prior to the date of the release. Tie Down was a party to neither the litigation nor the ensuing release.

On November 13, 1986, U.S. Anchor sued Rule and Tie Down, alleging that Rule had attempted to monopolize the fluke anchor market in violation of section 2 of the Sherman Act[6] beginning in October 1985 by engaging in

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[5] (...continued)
production of Tie Down following the Rule-Tie Down transaction in the final quarter of the 1984-85 season.

[6] Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several (continued...)

predatory pricing. U.S. Anchor also alleged that Rule and Tie Down had conspired to restrain trade in violation of section 1 of the Sherman Act[7] and conspired to attain a monopoly in violation of section 2, by agreeing to charge predatory prices, also beginning in October 1985. U.S. Anchor asserted an illegal tying arrangement by Rule, whereby its newly patented and supposedly revolutionary "Deepset" anchors allegedly were sold only to distributors who abstained from buying generic fluke anchors from suppliers other than Rule, in violation of section 1 of the Sherman Act and section 3 of the Clayton Act, as amended by the Robinson-Patman Act.[8] U.S. Anchor further alleged

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[6] (...continued)
States, or with foreign nations, shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2.

[7] Section 1 provides in relevant part: "Every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

[8] Section 3 of the Clayton Act provides in relevant part:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods . . ., whether patented or unpatented, for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. Among other possible differences between the Sherman Act and Robinson-Patman Act tying provisions is that the Sherman Act prohibition extends to arrangements affecting the sale of services and (continued...)

that Rule and Tie Down had conspired to restrain trade in violation of Georgia law. The district court denied the parties' cross-motions for summary judgment. 717 F. Supp. 1565. A jury trial followed during which the defendants moved for directed verdicts[9] as to all claims. The court granted their motions on the state law claims because it concluded that Georgia law did not permit damages to be recovered for a conspiracy in restraint of trade. The jury found Rule solely liable for attempted monopolization and jointly liable with Tie Down on both conspiracy counts. The verdict exonerated Rule of illegal tying. (R10-321). The jury set damages for each of the three violations at $1,638,028, which the court trebled to $4,914,084. Tie Down and Rule both moved for judgment notwithstanding the verdict on liability and for a new trial on the issue of damages. (R11-348, 349.) The district court denied these motions, awarded U.S. Anchor statutory attorney fees in the stipulated amount of $800,000 and entered judgment accordingly. (R14-382.) Rule and Tie Down appealed, and U.S. Anchor cross-appealed with respect to the state law tort claims. U.S. Anchor does not appeal the judgment on the tying claim.

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[8] (...continued)
realty as well as goods. *See, e.g. Tie-X-Press, Inc. v Omni Promotions Co.*, 815 F.2d 1407 (11th Cir. 1987) (tying arrangement conditioning the lease of coliseum theater space upon the employment of a ticket-selling agency affiliated with the lessor); *see generally Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1574-79 (11th Cir. 1991), *cert. denied*, ____ U.S. ____, 113 S.Ct. 295, 121 L.Ed.2d 219 (1992).

[9] A motion for directed verdict is now deemed a motion for judgment as matter of law, and motions for judgment notwithstanding the verdict are now renewed motions for judgment as a matter of law. *See* Fed. R. Civ. P. 50.

III. CONTENTIONS OF THE PARTIES

Rule contends that it engaged in no predatory conduct and disputes U.S. Anchor's showing of Rule's and Tie Down's costs of producing the anchors. Since a predatory pricing claim requires proof that defendants attempted or conspired to drive a competitor out of the relevant market by "pricing below some appropriate measure of cost," the issue of which costs to count may be vital. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n. 8, 106 S.Ct. 1348, 1355 n. 8, 89 L.Ed.2d 538 (1986) (noting but not resolving debate over which costs are "relevant"), *on remand, In re Japanese Elec. Prods. Antitrust Litig.*, 807 F.2d 44 (3d Cir. 1986), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1955, 95 L.Ed.2d 527 (1987). Rule advances numerous criticisms of U.S. Anchor's expert testimony on this point. Tie Down contends that U.S. Anchor failed to adduce any evidence that Tie Down's prices to Rule were below Tie Down's cost, that Tie Down had any knowledge of (or control over) Rule's other costs, or that it had any control over Rule's prices.

Rule also contends that it had no dangerous probability of successfully achieving a monopoly. The parties first dispute the existence of barriers to entry in the relevant market. Rule and Tie Down contend that without high barriers, a successful monopolist would not have been able to recoup the foregone profits inherent in below-cost pricing by charging supra-competitive prices following the end of the victim's competitive presence.[10] U.S. Anchor contends that there was sufficient evidence of entry barriers

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[10] A predatory pricing scheme could be successful by driving the victim out of business or by coercing him to reduce output to levels consistent with profit-maximization by a firm or syndicate possessing monopoly power. Either result would eliminate the victim's competitive presence.

to permit the jury to find them and that in any case actual recoupment is not required as a matter of law before the jury may find an attempt or conspiracy to monopolize. Second, Rule points to U.S. Anchor's own success and Rule's declining fortunes in the anchor market as evidence that it could not have monopolized.

Rule and Tie Down also challenge the sufficiency of the evidence of unlawful conspiracy. The parties dispute the inference to be drawn from plaintiff's exhibit 683, the MacKarvich market report. U.S. Anchor contends that MacKarvich was proposing to drive the new entrant from the marketplace. Defendants offered expert testimony, corroborated by MacKarvich himself, that studies of competitors' costs and revenues are common in competitive industries and that a projected loss after the first year of operation is ordinarily not enough to drive any new entrant from the market, since start-up companies must generally expect early losses. In its cross-appeal U.S. Anchor challenges the district court's exclusion of certain evidence that allegedly supports the existence of a conspiracy.

Rule and Tie Down challenge the sufficiency of U.S. Anchor's proof concerning damages. They argue that at least some of their price cuts were instituted to meet competition from foreign fluke anchor manufacturers and any loss of sales by U.S. Anchor resulting from such reductions is not antitrust injury. Moreover, they contend, the base price from which U.S. Anchor's revenue losses were calculated should have reflected competitive levels as shown by Rule's and U.S. Anchor's early, allegedly non-predatory reductions rather than prices prevailing before U.S. Anchor's entry into the market.

Rule and U.S. Anchor dispute the scope and effect of their settlement agreement in the prior litigation. Rule

contends that liability for all predatory sales before the date of the release was discharged. Moreover, Rule maintains that the alleged predatory scheme was ongoing at the time the contract was executed and therefore all post-release liability was discharged as well. U.S. Anchor contends that a general release is ineffective to discharge undiscovered antitrust liability as a matter of law and, moreover, that post-release damages were not waived. We do not reach this dispute as it applied to the federal antitrust claims.[11] As applied to the state law claims, we certify the question, along with the substantive issues of Georgia law, for resolution by the Supreme Court of Georgia.

In its cross-appeal U.S. Anchor also argues that the district court should not have granted a directed verdict on its state law claims because Georgia law allows private damage actions for conspiracies in restraint of trade. Rule and Tie Down disagree with U.S. Anchor's interpretation of Georgia law.

IV. STANDARD OF REVIEW

We review rulings on motions for judgment as a matter of law by applying de novo the same legal standards used by the district court. *Miles v. Tennessee River Pulp & Paper Co.*, 862 F.2d 1525, 1528 (11th Cir. 1989). Both courts consider all the evidence, but all reasonable inferences must be drawn in the nonmovant's favor. If the jury verdict is supported by substantial evidence—that is, enough evidence that reasonable minds could differ concerning material

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[11] Federal common law, not the state law of contracts, determines the effect of settlement agreements alleged to release federal antitrust claims. *Redel's Inc. v. General Elec. Co.*, 498 F.2d 95, 98 & n. 2 (5th Cir. 1974).

facts—the motion should be denied. A mere scintilla of evidence in the entire record, however, is insufficient to support a verdict. *See Hessen ex rel. Allstate Ins. Co. v Jaguar Cars, Inc.*, 915 F.2d 641, 644 (11th Cir. 1990). Denial of a motion for a new trial is reviewed for clear abuse of discretion. *Id.* at 644-45. A district court's evidentiary rulings are not disturbed unless there is a clear showing of abuse of discretion. *Id.* at 645.

V. ATTEMPTED MONOPOLIZATION

There are three essential elements of a claim alleging attempted monopolization under section 2 of the Sherman Act. First, the plaintiff must show that the defendant possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct. Second, the defendant must in fact commit such anticompetitive conduct. Third, there must have existed a dangerous probability that the defendant might have succeeded in its attempt to achieve monopoly power. *Spectrum Sports, Inc. v. McQuillan*, ____ U.S. ____, ____, 113 S.Ct. 884, 890, 122 L.Ed.2d 247 (1993); *see McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084, 109 S.Ct. 2110, 104 L.Ed.2d 670 (1989); 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 820 at 312 (1978) [hereinafter Areeda & Turner, *Antitrust Law*]. We address these elements in reverse order.

A. *Dangerous Probability of Success*

To have a dangerous probability of successfully monopolizing a market the defendant must be close to

achieving monopoly power.[12] Monopoly power is "the power to raise prices to supra-competitive levels or . . . the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market." *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1581 (11th Cir. 1985). Most attempts to measure monopoly power involve quantifying the degree of concentration in a relevant market and/or the extent of a particular firm's ability to control productive capacity in that market. In anaiyzing attempted monopolization's dangerous probability of success element, the estimate of market power is necessarily speculative to some extent because it requires an evaluation of future behavior by market participants viewed at the time the alleged attempt began. We are not without guideposts, however.

> Relevant determinants of the market power of a prospective predator in this regard include its absolute and relative market shares, and those of competing firms; the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment.

International Tel. & Tel. Corp., 104 F.T.C. 208, 412 (1984) (citation and footnotes omitted). Despite the seemingly broad array of factors employed by the Federal Trade Commission, the principal judicial device for measuring actual or potential market power remains market share, typically measured in terms of a percentage of total market

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[12] The terms "monopoly power" and "market power" are synonymous and are used interchangeably in this opinion.

sales. Thus, at the outset the appropriate market must be defined or identified.[13]

Defining the market is a necessary step in any analysis of market power and thus an indispensable element in the consideration of any monopolization or attempt case arising under section 2. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 350, 15 L.Ed.2d 247 (1965); *American Key*, 762 F.2d at 1579. Although the issue is fully developed in the fact section of Rule's brief, the argument section does not address the precise question of market definition. U.S. Anchor, in the fact section of its brief, contends that the question of market definition is not appropriately before us because Rule does not argue the point. (U.S. Anchor's Br. at 3 n. 1.) We must consider the question nevertheless before passing on the legal significance of evidence concerning Rule's potential market power. As the issue of Rule's dangerous probability of success has been preserved through argument, the subsidiary question of market definition is also preserved because it is set forth fully in the

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[13] This inquiry may be labelled more appropriately as "market estimation." *See* Herbert Hovenkamp, *Economics and Federal Antitrust Law* 59 (1985).

fact section of Rule's brief.[14] The issue was fully argued before the district court.[15]

The definition of the relevant market is essentially a factual question, so the precise issue we first must address is whether U.S. Anchor introduced sufficient evidence to raise a jury question on the inclusion of Danforths. *See, e.g. Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1366 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977).[16]

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[14] *See* Fed. R. App. P. 28(a)(4) (brief shall include "a statement of the facts relevant to the issues presented for review, with appropriate references to the record"); *cf. Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 n.1 (5th Cir. 1980) (per curiam) (brief that merely stated an issue, without providing any argument or facts, deemed to waive it). For instance, the plaintiff's brief in *American Key* raised the question of market definition but failed to raise, *inter alia*, the existence of monopoly power. Although the omission technically "abandoned" the issue of market power, the court addressed it anyway. 762 F.2d at 1579-81. We believe Rule's brief puts this case closer to *American Key* than cases in which a brief merely stated an issue without fact and argument, or actually ignored an entire claim or defense. *Cf. Joe Regueira, Inc. v. American Distilling Co.*, 642 F.2d 826, 833 n. 16 (5th Cir. Unit B April 1981); *In re Municipal Bond Reporting Antitrust Litig.*, 672 F.2d 436, 439 n. 6 (5th Cir. 1982).

[15] (*See* R10-301-4, Memo at 28-30 (Rule's Motion for Directed Verdict and Memorandum in Support); R9-299 Br. at 3-6 (Tie Down's Motion for Directed Verdict and Brief in Support).)

[16] Decisions of the former Fifth Circuit rendered before October 1, 1981, are binding upon panels of this court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

1. Defining the Market

"Defining a relevant product market is primarily 'a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other.'" *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987) (quoting *SmithKline Corp. v. Eli Libby & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978)). The reasonable interchangeability of use or the cross-elasticity of demand[17] between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962).

> [W]ithin the broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors . . . . The cross-elasticity of production facilities may also be an important factor in defining a product market . . . .

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[17] Also known as "demand substitution."

Id. at 325 & n. 42, 82 S.Ct. at 1523-24 & n. 42 (citations and footnotes omitted). As the Supreme Court's language itself suggests, defining a "submarket" is the equivalent of defining a relevant product market for antitrust purposes. *International Telephone & Telegraph* adequately summarizes our view of the relevant proof:

> Reliable measures of supply and demand elasticities provide the most accurate estimates of relevant markets. However, it is ordinarily quite difficult to measure cross-elasticities of supply and demand accurately. Therefore, it is usually necessary to consider other factors that can serve as useful surrogates for cross-elasticity data . . . . In the case of product market definition, these factors may include
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> > whether the products and services have sufficiently distinctive uses and characteristics; whether industry firms routinely monitor each other's actions and calculate and adjust their own prices (at least in part) on the basis of other firms' prices; the extent to which consumers consider various categories of sellers . . . as substitutes; and whether a sizeable price disparity between different types of . . . sellers . . . persists over time for equivalent amounts of comparable goods and services.

104 F.T.C. at 409 (quoting *Grand Union Co.*, 102 F.T.C. 812, 1041 (1983)) (footnotes omitted).

We note that Danforth brand anchors are functionally interchangeable with their equivalent counterparts among the generic brands. Indeed, among smaller sized anchors the Hooker and Danforth anchors have always been virtually identical. (R30-131-33; R33-129-31.) This interchangeability suggests a likelihood that consumers of generic brands would willingly switch to Danforths in the event of significant price increases among generics. Similarly, Danforth customers might switch to generic brands if Rule implemented a significant increase in the price of Danforths. The likelihood of demand substitution, if proven, weighs strongly in favor of including the two categories of product within a single market for antitrust analysis. This is so because the very purpose of defining the relevant market under section 2 is to determine whether a monopolist, cartel or oligopoly in that market would be able to reduce marketwide output simply by cutting its own output, and thereby raise marketwide prices above competitive levels. *United States v. E.I. du Pont de Nemours & Co. (The Cellophane Case)*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision, Inc.*, 714 F.2d 351, 356 (4th Cir. 1983), *cert denied*, 465 U.S. 1027, 104 S.Ct. 1285, 79 L.Ed.2d 688 (1984).[18]

We hold, however, that the relevant market in this case constituted light weight generic and economy fluke anchors. Four of the *Brown Shoe* factors weigh strongly in favor of excluding Danforths from the relevant market; distinctly higher prices, a distinct group of customers, strongly inelastic demand and limited substitution of supply.

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[18] *See also, e.g.*, Richard A. Posner, *Antitrust Law: An Economic Perspective* 125-26 (1976); Hovenkamp, *supra* at 59.

Moreover, the higher prices charged for Danforths are evidence that a distinct group of customers was unwilling to switch away from the prestigious branded product in response to price increases above competitive levels. The fact that this group remained loyal to Danforths despite prices 50 to 96% and more above prices for functionally interchangeable alternative products shows inelastic demand and limited demand interdependence. More importantly, U.S. Anchor showed no reasonably possibility that a significant number of consumers would have switched to Danforths, many of which were offered at nearly double the price of their generic substitutes, in response to more modest increases in generic prices. And as more fully discussed below, there is no evidence that Rule had (or would have) varied its output of Danforths in response to price changes in the broader market. We hold, therefore, that the record provides no support for finding significant cross-elasticity of demand or supply between Danforths and generic anchors.

First, U.S. Anchor's evidence was insufficient for a reasonable juror to conclude that there was a significant cross-elasticity of demand. U.S. Anchor's evidence demonstrated that an increase in the spread between prices for Danforths and other anchors had coincided with lower sales of Danforths. During the period from September 1985 until August 1990, sales of Danforths fell by 61.5% while the spread between the prices of Danforths and other anchors increased by 9.1%. (USTX 638; R40-106.) (According to the exhibit, Danforth prices rose while Sentinel and Hooker prices fell). Although we recognize that correlation is often relied upon to infer causation, *see, e.g., Cellophane,* 351 U.S. at 400, 76 S.Ct. at 1010, we do not believe that this aggregation of sales data over five years provided a sufficiently close correlation between changes in demand and price to justify the inference that consumers were willing and able to switch away from Danforths *because of* increasing

price differences. The exhibit wholly fails to take account of factors other than price (or quality) which may have affected demand for Danforths. If changes in relative prices had been more closely correlated in time with shifting purchases than it might have been reasonable to infer that the demand shifts were caused by the price differences. As the evidence stands, however, the datum aggregating demand behavior from 1985 to 1990 fails to provide any basis from which the jury could have inferred that the demand shifts were caused by prices instead of other factors. Those non-price, non-quality factors might well have included consumers' increased awareness of the similarities between Danforths and other brands (perhaps caused by U.S. Anchor's successful promotion of its own products), changing attitudes concerning thrift and the value of money, the decline in demand for fluke anchors generally after the 1987-88 season, (*see* USTX 479), or competition from Rule's own more expensive premium Deepset line. Over time the shape of a demand curve changes independently of variations in the pricing and quality of particular substitute products. Aggregate (or average) evidence of demand over too long a period of time provides no support for inferring that changes apparently correlated with substitute price movements represent shifts in the curve caused by those variations in prices. Given the changes in the behavior of competitors that occurred over the five years in question, namely the development of fierce price competition between Rule and U.S. Anchor in the generic and economy market and the introduction of Deepsets, we conclude that the average Danforth sales statistic was insufficient evidence from which the jury could have inferred demand cross-elasticity in October 1985 or thereafter. *Cf. Yoder Bros.*, 537 F.2d at 1367-68. This conclusion is buttressed by the more precise sales data provided by USTX 508. Comparing the 1985-86 and 1986-87 seasons, which are the two closest in time to the date when the alleged predation began in

October 1985 for which data were offered, the exhibit shows that unit sales of Danforths fell 5.4%[19] despite a price reduction of 0.5% and a simultaneous increase in the prices of generic anchors of 0.8%. *Id.* at 2. Danforths suffered this decline while the overall demand for fluke anchors jumped 19%, from 273,000 to 325,000 in annual unit sales. (USTX 479.)[20]

Just as an increase in Danforth prices might have been expected to drive customers away from Rule and into the arms of generic manufacturers, an increase in prices for generic brands would likely cause some otherwise price-sensitive customers to prefer the more expensive Danforths. Nonetheless, the present record provides no basis other than guesswork for concluding that a shift away from generics would have been significant in magnitude;[21] the large spread in prices between generic anchors and Danforths tends to suggest that the shift would not have been great. Thus, we conclude that the record provides no support for finding significant cross-elasticity of demand between Danforths and generics.

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[19] U.S. Anchor's unit sales exhibit, USTX 479, shows an even more marked decrease in Danforth sales for the two seasons: a 7.8% drop from 56,431 in 1985-86 to 52,035 in 1986-87. This is only one example of inconsistency in the evidence offered by U.S. Anchor, but we assume that the jury credited the version least favorable to Rule.

[20] Faced with this evidence, we can only note that the absence of proof concerning changes in prices and sales before the Rule-Tie Down transaction is an especially prominent flaw in U.S. Anchor's case.

[21] By "significant in magnitude" we refer to a shift that is large enough to render unprofitable a monopolistic price increase in the broader market. Again, we defer the task of establishing criteria for testing the quantitative significance of changes in this variable.

Second, the evidence was insufficient for a reasonable juror to find a significant cross-elasticity of supply. The jury could not reasonably have found that the manufacturing capacity used to make Danforths likely would have been switched to making generic anchors in response to moderate price increases by a sole seller of the lower priced products. To be sure, the productive processes employed in manufacturing Danforths were virtually identical to those used for generics. (R33-145-50.) Yet it defies logic to suggest that a rational supplier[22] would switch from selling branded products at high prices to selling equally costly equivalent products at lower prices, even assuming that the lower prices would yield significant supranormal profits. Put another way, it would be unreasonable to expect Rule to lower the price of Danforths and abandon its ability to discriminate against brand-conscious boaters solely to earn smaller profits. There was insufficient evidence of likely supply substitution from which to conclude that any portion of Danforth output would have served to constrain price increases among the generic anchors.[23]

Moreover, the record demonstrates that the Danforth line, although functionally equivalent to their counterparts, may have constitutes its own market based on consumer brand loyalty. The fluke anchor industry presented the unusual circumstance of severe price discrimination against a distinct group of consumers based solely on brand

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[22] There is no evidence that Rule was irrational in its pricing strategies, although it may well have been misinformed or overly optimistic concerning U.S. Anchor's staying power in the market.

[23] Of course, Rule's exclusive control over the Danforth trademark also eliminated the possibility of supply substitution by other firms making Danforths. This observation by itself, however, would not be sufficient to show that Danforths and generics represented distinct markets.

preference. U.S. Anchor's expert, Dr. Williard F. Mueller, testified on direct examination that "people have gotten an attachment to the Danforth Standard in this case, it had kind of a mystique about it at one time, . . . what happens in one year, simply a price difference, doesn't result in an immediate king of shift." (R40-106.) Although interbrand competition generally restrains the pricing behavior of individual brand sellers, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n. 19, 97 S.Ct. 2549, 2558 n.19, 53 L.Ed.2d 568 (1977), *on remand*, 461 F. Supp. 1046 (N.D. Cal. 1978), *aff'd*, 694 F.2d 1132 (9th Cir. 1982), it is settled that customer brand loyalty may constitute an impediment to competition and thus an aid in the exercise of market power. *See. e.g., United States v. Pabst Brewing Co.*, 384 U.S. 546, 559-61, 86 S.Ct. 1665, 1672, 16 L.Ed.2d 765 (1966) (Harlan, J., concurring), *on remand*, 296 F. Supp. 994 (E.D. Wis. 1969).[24] A single branded product may, in rare cases, constitute its own relevant market. *Los Angeles Mem. Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1393 (9th Cir.), *cert. denied*, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984).

The understanding that brand loyalty may facilitate monopolization is consistent with the general proposition that the ability to discriminate against a distinct group of customers by charging higher prices for otherwise similar products demonstrates the existence of market power with respect to that group. *See United States V. Grinnell Corp.*,

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[24] *See also Cellophane.* 351 U.S. at 392-93, 76 S.Ct. at 1005-06; *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150, 1154 (6th Cir.1980); *cf. Justice Department Guidelines, supra* § *3.3* n. 33 (noting that case or difficulty of long-term committed entry into a market may depend upon "the relative appeal, acceptability and reputation of incumbents' and entrants' products").

384 U.S. 563, 574, 86 S.Ct. 1698, 1706, 16 L.Ed.2d 778 (1966).[25] The existence of such market power may, as a practical matter, remove the higher priced product from the broader market composed of its functional substitutes. *See C.E. Services, Inc. v Control Data Corp.*, 759 F.2d 1241, 1246 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 604, 88 L.Ed.2d 583 (1985) (holding that "a ubiquitous price differential of some 20-25%" between branded and unbranded services, combined with other *Brown Shoe* factors, could justify finding a separate market for the unbranded services and thus precluded summary judgment on the issue of market definition).

We do not suggest that the existence or hypothetical possibility of monopoly power over one product automatically excludes it from a broader market. "[S]ubmarkets are not a basis for the disregard of broader line of commerce that has economic significance." *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360, 90 S.Ct. 2035, 2041, 26 L.Ed.2d 658 (1970). We do hold, however, that regardless of which party in the case bears the ultimate burden of persuasion, the broader economic significance of a submarket must be supported by demonstrable empirical evidence. Although perhaps difficult to come by, evidence that the dominant firm within a submarket costs of production were insensitive to changes in the quantity of goods sold, suggesting that its only rational response would be to increase output to satisfy the higher demand in the event of price increases above competitive levels in the broader market, might show that submarket

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[25] *See also, e.g.*, 2 Areeda & Turner, *Antitrust Law, supra* ¶ 514; Phillip E. Areeda & Herbert Hovekamp, *Antitrust Law* ¶ 518.1d (Supp. 1991) [hereinafter Areeda & Hovekamp, *Antitrust Law*]; Gregory J. Werden, *Market Delineation and the Justice Department's Merger Guidelines*, 1983 Duke L.J. 514, 522, 529-30.

production in fact disciplined price levels in the broader market. Especially if the submarket represents a premium-priced segment of the broader market, the relevance of proof regarding elasticity of supply would depend on the validity of the assumption that significant numbers of consumers would switch in response to significant price increases in the broader market, an assumption that may or may not be supported by evidence or common experience. In the present case U.S. Anchor can rely upon neither evidence nor inference. Simpler evidence of supply and demand substitution, like proof that producers in the submarket had actually increased or decreased their sales in response to corresponding price changes in the broader market, would also suffice. As we have pointed out, however, U.S. Anchor failed to meet its burden of proving interdependent market behavior by this method as well.

Considering all the evidence in light of the factors identified by *Cellophane* and *Brown Shoe* and explained in subsequent decisions, we conclude as a matter of law that the relevant product market was light weight generic and economy fluke anchors.

2. Measuring Power in the Market

The principal measure of actual monopoly power is market share, and the primary measure of the probability of acquiring monopoly power is the defendant's proximity to acquiring a monopoly share of the market. Thus, a sufficiently large market share may alone create a genuine dispute over whether the defendant possessed a dangerous probability of successfully monopolizing a market despite the existence of other facts tending to make monopolization unlikely, thereby precluding summary judgment for the defendant. *McGahee v. Northern Propane Gas Co.*, 858 F.2d at 1506. When assessing market shares for the purpose

of ascertaining market power the appropriate measure of a firm's share is the quantity of goods or services actually sold to consumers. Although revenues are often relied upon as a surrogate for quantity, actual unit sales must be used whenever a price spread between various products would make the revenue figure an inaccurate estimator of unit sales. *Brown Shoe*, 370 U.S. at 341 n. 69, 82 S.Ct. at 1533 n. 69.

In *McGahee* we noted in dicta that several factors may be relevant to whether a particular market share evidences a dangerous probability of success. 858 F.2d at 1505 (citing *McGahee v. Northern Propane Gas Co.*, 658 F. Supp. 189, 196-97 (N.D. Ga. 1987), *rev'd*, 858 F.2d 1487 (11th Cir. 1988)). In finding no dangerous probability of success the district court had relied upon the ease of entry by new firms and expansion from adjacent geographic markets, the number and size of alleged victims of the predation and the defendant's declining market share during the alleged attempt to monopolize. 658 F. Supp. at 196-97. Nevertheless, we held:

> Without examining any factors to determine what market share would be necessary for Northern Propane's alleged predatory pricing to present a dangerous probability of success, we can say that a sixty or sixty-five percent market share is a sufficiently large platform from which such a scheme could be launched to create a genuine issue of material fact as to whether there was a dangerous probability that Northern Propane would succeed in achieving a monopoly.

McGahee, 858 F.2d at 1506. Finding it "undisputed" that the defendant possessed such a share, we reversed the

district court's order of summary judgment for the defendant and remanded for further proceedings. Our holding in *McGahee* that market share estimated with reasonable confidence to fall between 60 and 65% suffices to raise a jury question concerning dangerous probability of success is binding circuit precedent. *Sherry Mfg. Co. v. Towel King, Inc.*, 822 F.2d 1031, 1034 n. 3 (11th Cir. 1987). We do note, however, the tension between *McGahee*'s bright-line approach and *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969), in which the court noted that "one must be particularly wary of the numbers game of market percentage when considering an 'attempt to monopolize' suit" under the dangerous probability standard. 417 F.2d at 207 n. 2; *cf. United States v. Columbia Steel Co.*, 334 U.S. 495, 528, 68 S.Ct. 1107, 1124, 92 L.Ed. 1533 (1948) ("the relative effect of percentage command of a market varies with the setting in which that factor is placed") (actual monopolization case). We believe the cases may be reconciled by requiring a careful definition of the relevant market (as mandated by *Walker Process* and *American Key*)[26] and an assessment of each firm's ability to vary its output in calculating the size of the market and attributing individual market shares. *See, e.g., United States v. General Dynamics Corp.*, 415 U.S. 486, 499-504, 508-10, 94 S.Ct. 1186, 1194-97, 1199-1200, 39 L.Ed.2d 530 (1974) (measuring power in market for coal in terms of possession or likely near-term acquisition of uncommitted reserves

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[26] Notably, in *McGahee* itself the district court had observed that despite the defendant's concession for summary judgment purposes concerning the relevant product market, "there is, at the very least, an issue of fact as to whether propane constitutes a distinct product market." 658 F. Supp. at 192 n. 3 (citing *United States v. Empire Gas Corp.*, 537 F.2d 296, 303-304 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977)).

instead of overall sales, because most sales represented fulfillment of existing long-term requirements contracts).

In *Cliff Food Stores* the former Fifth Circuit stated that something more than 50% market share would be required to show *actual* monopoly, at least in the absence of collusive price leadership or tacit coordination in an industry. 417 F.2d at 207 n. 2. The Second Circuit in *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122 (2d Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981), similarly suggested that the absence of *actual* monopoly power could be found as a matter of law when the defendant supplies only 50% of the market, "or even somewhat above that figure, [when] the record contains no significant evidence concerning the market structure to show that the defendant's share of that market gives it monopoly power." 651 F.2d at 129. Despite these suggestions, we have discovered no cases in which a court found the existence of actual monopoly established by a bare majority share of the market. Nevertheless, a dangerous *probability* of achieving monopoly power may be established by a 50% share. For this reason, it is usually necessary to evaluate the prospects for monopolization as they existed when the alleged attempt began. As shown by the undisputed facts discussed *infra*, Rule never possessed a dangerous probability of success during the time for which U.S. Anchor seeks damages.

U.S. Anchor points to the combined market shares of Rule and Tie Down at the end of the 1984-85 season, immediately before the transaction that eliminated Tie Down as a supplier and transferred its production to Rule. Accepting *arguendo* the implicit contention that Tie Down's pretransaction market share should be attributed to Rule, we conclude from the undisputed evidence that Rule's market share on August 31, 1985, the eve of the 1985-86 season,

was 61.5%, (RTX 674), and its aggregate (average) share over the entire season was 30.1%, (*id.*, RTX 675 at 1).

Rule has argued that we should not attribute all of Tie Down's pre-transaction market share to it. After the transaction Tie Down had no need for its anchor sales representatives, many of whom found engagements with U.S. Anchor and employed their connections and reputation on behalf of the newcomer's selling efforts. Moreover, U.S. Anchor's Chapman was well known to customers from his days with Tie Down. Thus, according to Rule, U.S. Anchor stepped into Tie Down's shoes and inherited at least some of Tie Down's pre-transaction market share, presumably that portion which U.S. Anchor had the productive capacity to satisfy. This argument is persuasive, although it may be subject to rebuttal on at least two grounds. *Cf. American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1321-22 (7th Cir. 1991). First, the depth of Rule's product line and the expertise of its own sales force conferred competitive advantages which might have induced some of Tie Down's former customers to stay with the Hooker line. Second, the anchor industry was highly concentrated and customers had few alternative sources of supply, a factor that is especially important in view of Rule's effort to link purchase of the Deepset anchors to exclusive dealing arrangements with distributors. We need not reach the merits of Rule's contention, however, because even if we consider Rule to have had 61.5% of the market on August 31, 1985, there was insufficient evidence from which the jury could have found a dangerous probability of monopolization in October.

As we have outlined above, Rule's *average* market share for the 1985-86 season was 30.1%, a fact which strongly indicates that Rule's share declined sharply from 61.5% after U.S. Anchor's entry into the market in August.

For the month of October, U.S. Anchor's sales of generic and economy anchors exceeded Rule's by 5.7%. (RTX 675 at 15). Prior to October U.S. Anchor had no sales at all, but the firm was accepting orders during this time and apparently possessed the capacity to fill them. Thus, Rule was never able to maintain a majority position in the market during the 1985-86 season. *Cf. General Dynamics*, 415 U.S. at 501-02, 94 S.Ct. at 1196. Accordingly, because Rule possessed less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success in October 1985 as a matter of law.

3. Recoupment

Rule argues that the district court should have granted its motion for judgment notwithstanding the verdict based on its contention that there can be no dangerous probability of successful monopolization by predatory pricing unless it is shown that the defendant would have recouped the foregone revenues associated with its price-cutting strategy.[27] Our disposition of this case, however, makes it unnecessary to address Rule's recoupment argument.

B. *Anticompetitive Conduct, Specific Intent and Damages*

Our conclusion that U.S. Anchor failed to show a dangerous probability of success makes it unnecessary for purposes resolving its attempt claim to evaluate the evidence of Rule's and Tie Down's costs, as would be required to

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[27] If we accepted Rule's argument we could simply remand for a new trial with directions to instruct the jury concerning this "element" of the plaintiff's case, or we could evaluate the record to see whether the jury could have found the element proven.

classify its pricing conduct as anticompetitive. *See Matsushita,* 475 U.S. at 585 n. 8, 106 S.Ct. at 1355 n. 8; *International Air Industries, Inc. v. American Excelsior Co.,* 517 F.2d 714, 723-25 (5th Cir. 1975). The same is true with respect to the evidence of specific intent to achieve monopoly power by unlawful conduct, although we note that such intent may sometimes be inferred from predatory conduct itself. *Spectrum Sports,* ____ U.S. at ____, 113 S.Ct. at 892; *International Tel. & Tel.,* 104 F.T.C. at 401-02; *see also McGahee,* 858 F.2d at 1503-04. Nor must we decide whether to parse this evidence for the precise level during each season at which Rule's prices unlawfully dropped below its costs in order to assess U.S. Anchor's proof of damages, as requested by Rule. *See MCI Communications Corporation v. American Telephone and Telegraph Company,* 708 F.2d 1081, 1162, 1165 (7th Cir. 1983).

VI. CONSPIRACY

U.S. Anchor's conspiracy claims are distinct from its attempted monopolization claim. The elements of a conspiracy to monopolize under Section 2 are (1) an agreement to restrain trade, (2) deliberately entered into with the specific intent of achieving a monopoly rather than a legitimate business purpose, (3) which could have had an anticompetitive effect, and (4) the commission of at least one overt act in furtherance of the conspiracy. *Seagood Trading Corp. v. Jerrico, Inc.,* 924 F.2d 1555, 1576 (11th Cir. 1991). The elements of a conspiracy to restrain trade under Section 1 are (1) an agreement to enter a conspiracy (2) designed to achieve an unlawful objective. *Bolt v. Halifax Hosp. Medical Ctr.,* 891 F.2d 810, 820 (11th Cir.), *cert. denied,* 495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990), *appeal after remand,* 980 F.2d 1381 (11th Cir.

1993). The plaintiff must also prove (3) "actual unlawful effects [or] facts which radiate a potential for future harm" to competition. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 622, 73 S.Ct. 872, 888, 97 L.Ed. 1277 (1953).

There is no requirement, however, that a conspiracy under either provision have a dangerous probability of successfully achieving its objectives. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984). Moreover, "[a] section 1 plaintiff . . . need not prove an intent on the part of the co-conspirators to restrain trade or to build a monopoly. So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under section 1." *Bolt*, 891 F.2d at 819-20 (citations omitted). We have said, however, that "a section 1 claim and a section 2 conspiracy to monopolize claim require the same threshold showing–the existence of an agreement to restrain trade." *Seagood*, 924 F.2d at 1576.

U.S. Anchor points to evidence of the unlawful intent necessary to create such an agreement. We have reviewed this evidence and find it sufficient to show an intent to achieve an unlawful objective on Rule's part, namely the use of predatory means to monopolize the fluke anchor market. Nevertheless, there is insufficient evidence linking Tie Down to Rule's efforts to support a finding of conspiracy between them. Federal antitrust law requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately. *Bolt*, 891 F.2d at 819; *see also Monsanto Co. v. Spray-Right Serv. Co.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1470, 79 L.Ed.2d 775 (1984). U.S. Anchor did not meet this heightened standard of proof. *Cf. Boczar v. Manatee Hosps. & Health Sys., Inc.*, 993 F.2d 1514, 1518-19 (11th Cir. 1993) (finding

sufficient evidence when defendant's supposed legitimate reasons for acting were shown to be fabricated and contrived).[28] The MacKarvich market report, USTX 683, for instance, does not show that Tie Down desired to employ predatory means to drive U.S. Anchor from the market. Rather, it merely shows the prices at which it would be possible to inflict losses on the newcomer. It says nothing about Rule's costs, and U.S. Anchor does not dispute that Tie Down had no knowledge of Rule's costs other than the price paid for anchors. Tie Down's experts and MacKarvich himself testified that such studies are common in competitive industries and consistent with legitimate competition based on price. MacKarvich's recommendation to set prices low enough to inflict losses on U.S. Anchor merely shows a desire to win on the basis of efficiently producing a product and selling it at a lower price than less efficient rivals. It is not unlawful to slash prices in an attempt to obtain more sales, even if the result is that a competitor happens to be driven out of business. *Ball Mem. Hosp., Inc. v. Mutual Hosp. Ins. Inc.*, 784 F.2d 1325, 1338-39 (7th Cir. 1986). Moreover, to suffer a loss in the first year of operation is common in competitive industries, and for MacKarvich to anticipate that U.S. Anchor would be temporarily unprofitable does not necessarily show a desire or expectation that the firm would be driven from the

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[28] We have considered U.S. Anchor's contention that the district court abused its discretion by excluding certain evidence that Rule's customers perceived an attempt by Rule to eliminate U.S. Anchor from the market, a perception based upon reported statements made by a Rule employee. (*See* USTX 206.) This evidence has such little bearing on the existence of an agreement between Rule and Tie Down that its exclusion on hearsay grounds, even if erroneous, *see United States v. Pendas-Martinez*, 845 F.2d 938, 942-43 (11th Cir. 1988); *Southern Stone Co. v. Singer*, 665 F.2d 698, 703 (5th Cir. Unit B Jan. 1982), was harmless. Fed. R. Evid. 103(a). We see no abuse of discretion.

marketplace. In short, we have examined the record closely and find there is insufficient evidence linking Tie Down with Rule's scheme to constitute a conspiracy under the substantive proof requirements of federal antitrust law.

Without Tie Down, there was no one with whom Rule could have conspired. Hence, its unilateral conduct was not actionable as a conspiracy under federal antitrust law. The district court erred in denying judgment as a matter of law for Rule and Tie Down on the Sherman Act conspiracy claims.

VII. CLAIMS UNDER GEORGIA LAW

U.S. Anchor's complaint alleged violations of article III, § VI, ¶ 5 of the Georgia constitution and O.C.G.A. § 13-8-2(a)(2), which invalidate certain contracts in restraint of trade. (R1-1, ¶¶ 60-62.) U.S. Anchor concedes that these provisions merely render such agreements unenforceable and provide no cause of action for damages to those who are parties thereto, *see E.T. Barwick Indus. v. Walter E. Heller & Co.*, 692 F. Supp. 1331, 1349 (N.D. Ga. 1987), but argues that Georgia recognizes a common law tort action in favor of third parties who are injured by a conspiracy in restraint of trade. We agree with U.S. Anchor that its complaint stated a valid claim for damages as a result of a conspiracy in restraint of trade. *See Blackmon v. Gulf Life Ins. Co.*, 179 Ga. 343, 175 S.E. 798, 802-03 (1934) (holding that allegations of predatory pricing conspiracy with intent to monopolize stated a cause of action); *Atlanta Association of Fire Ins. Agents v. McDonald*, 181 Ga. 105, 181 S.E. 822, 828 (1935) (awarding nominal damages and injunction for group boycott); *see also Harrison Co. v. Code Revision Comm'n*, 244 Ga. 325, 260 S.E.2d 30, 34 (1979). The district court

erred in failing to perceive "the distinction between a contract or agreement merely on restraint of trade as between the parties, and a combination or contract to stifle competition, or a conspiracy to ruin a competitor." *Brown v. Jacobs Pharmacy Co.*, 115 Ga.429, 41 S.E. 553, 556 (1902) (suit for damages and injunction). Although we have found insufficient evidence of a conspiracy under federal law standards, this does not answer the question of whether Georgia courts would find sufficient evidence of conspiracy under their substantive law. *Cf. Sachdeva v. Smith*, 167 Ga. App. 80, 306 S.E.2d 19, 20 (1983).

We have previously held that Georgia law provides a cause of action for tortious interference with the business relationships between a plaintiff and its customers, suppliers or representatives. To be held liable the defendant "must have (1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) [caused] plaintiff [to] suffer[ ] some financial injury." *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1518 (11th Cir. 1989) (quotation omitted)., *cert. denied*, 494 U.S. 1081, 110 S.Ct. 1813, 108 L.Ed.2d 943 (1990), *appeal after remand*, 990 F.2d 1186 (11th Cir. 1993), *amended*, 997 F.2d 1340 (11th Cir. 1993) (per curiam); *see also NAACP v. Overstreet*, 221 Ga. 16, 142 S.Ed.2d 816, 822 (1965), *cert. dismissed*, 384 U.S. 118, 86 S.Ct. 306, 16 L.Ed. 2d 409 (1966). The defendant may show that competitive conduct is privileged by establishing that it used no improper means. *Integrated Micro Sys., Inc. v. NEC Home Elecs. (USA), Inc.*, 174 Ga. App. 197, 329 S.E. 2d 554, 559 (1985), *cert. denied*, No. 69405 (Ga. Apr. 24, 1985).

U.S. Anchor's complaint adequately pleads a claim for relief under this theory to present it for adjudication by the district court. Count V gave full notice to the defendants that U.S. Anchor sought recovery under Georgia law for "Unfair Methods of Competition and Unfair Acts and Practices," including conduct which was "inequitable, unfair, unscrupulous, in violation of public policy and unconscionable and tend[ing] to defeat or lessen competition . . . ." (R1-1 ¶¶ 59-60.) The fact that paragraph 60 of the complaint also refers to the constitutional and statutory provisions which U.S. Anchor concedes confer no independent damages remedy does not by itself deprive the defendants of "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957)); *see* Fed. R. Civ. P. 8(a)(2). The issue of whether the tort theory is applicable to the facts of this case was adequately argued to the district court in connection with U.S. Anchor's requested jury instructions, (R28-136-45), and thus preserved for appellate review. *Cf. Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1519 (11th Cir. 1991).

The novel questions presented are whether below-cost pricing can satisfy the improper action element of the tort and whether low prices, standing alone, can constitute a prohibited inducement of the plaintiff's customers. *Cf. Parks v. Atlanta News Agency, Inc.*, 115 Ga. App. 842, 156 S.E.2d 137, 140 (1967) (holding that solicitation of competitor's customers is not itself tortious, even when combined with "preferential" prices), *cert. denied*, No. 42624 (Ga. July 14, 1967). We regard it as unclear whether tortious interference with business relations under Georgia law may be established by a showing of predatory pricing

and, if so, what sort of pricing conduct would be deemed predatory. We also have some doubt as to whether intentional interference with business relations is a distinct cause of action from the tort of conspiracy in restraint of trade, or whether there is only a single theory of relief, so that proof of a conspiracy to interfere with the plaintiff's business relations would be actionable as U.S. Anchor's sole remedy for the alleged joint conduct of Rule and Tie Down. *Compare Cook v. Robinson,* 216 Ga. 328, 116 S.E.2d 742 (1960) *with Jacobs Pharmacy,* 41 S.E. at 554-57 (quoting *Doremus v. Hennessy,* 176 Ill. 608, 52 N.E. 924 (1898)); *see also Overstreet,* 142 S.E.2d at 822. This is not a matter of mere semantics, for while it appears settled that predatory pricing by a group or conspiracy is actionable, we have found no Georgia authority addressing predation by a single defendant acting unilaterally.

Another issue affecting the outcome of U.S. Anchor's state law claims is the validity and effect of its settlement agreement with Rule, executed on March 19, 1986. The agreement provided that each party would release the other

> from any and all actions, demands, claims or causes of action whatsoever, which now exist or which may arise in the future, as a result of events which occurred prior to the execution of the Settlement Agreement, including, without limitation, any claims which were or could have been presented by way of complaint or counterclaim in Civil Action Number C85-4466A.

(RTX 457.) Because the predatory pricing scheme allegedly began in October 1985, Rule contends that the settlement agreement operated as a release of U.S. Anchor's cause of action. U.S. Anchor contends that its predatory pricing

claims were undiscovered at the time the release was executed and therefore were not intended to be released. In addition, it contends that injuries caused by predatory conduct occurring after the release would not have been discharged even if they arose as a result of a scheme or conspiracy that was ongoing when the release was signed.[29] The district court concluded that the federal predatory pricing claims were undischarged because the agreement unambiguously applied only to causes of action related to the prior litigation. It also relied on Chapman's oral testimony concerning his intent at the time he signed the agreement and on *Covington v. Brewer*, 101 Ga. App. 724, 115 S.E.2d 368, 372-73 (1960), in which the court held that the scope of a release as intended by the parties could not be presumed to encompass rights respecting a subject matter not clearly referred to in the body of the agreement. *But cf. Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1311-12 (5th Cir. 1983).

The doctrine of pendent jurisdiction as outlined in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), gives the district court power to decide claims arising under the state law as to which there was no independent basis for federal jurisdiction but which

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[29] *Compare Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029, 1043-44 (5th Cir. 1977), *cert. denied*, 434 U.S. 859, 98 S.Ct. 185, 54 L.Ed.2d 132 (1977), *Poster Exchange, Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 127 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 784, 46 L.Ed.2d 643 *and* 425 U.S. 971, 96 S.Ct. 2166, 48 L.Ed.2d 793 (1976), *appeal after remand*, 542 F.2d 255 (5th Cir. 1976) (per curiam), *cert. denied*, 431 U.S. 904, 97 S.Ct. 1697, 52 L.Ed.2d 388 (1977), *and Redel's Inc. v. General Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) *with Record Club of Am., Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211, 217 & n. 8 (S.D.N.Y. 1985).

share a common nucleus of operative fact with federal claims. The court also has discretion not to hear such state law claims.

> Under *Gibbs*, a federal court should consider and weigh, in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline to exercise its jurisdiction by dismissing the case without prejudice.

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988) (footnote omitted). While the doctrine is flexible one according great leeway to the court, *see id.* at 350 n. 7, 108 S.Ct. at 619 n. 7, we have found an abuse of discretion in failing to dismiss a case when the federal claims were resolved early in the proceedings and the state law claims posed issues of first impression. *See Hardy v. Birmingham Bd. of Educ.*, 954 F.2d 1546 (11th Cir. 1992).

In the present case, the federal claims have survived through trial and have only been resolved on appeal. Thus, the parties have already tried the state law claims in federal court, although the district court's ruling prevented the jury from considering them. The legal issues have been decided by the district court and are now properly before us for review, so that judicial economy and convenience weigh in

favor of retaining jurisdiction. On the other hand some of the state law issues are novel, and comity between federal and state judicial systems weighs in favor of determination by state courts. Moreover, a ruling by this court in favor of U.S. Anchor's position would require a new federal trial in which only state law claims would be put in issue. Fairness to U.S. Anchor, however, prevents us from dismissing the state law claims. Dismissal would require the plaintiff to re-file its action in state court more than eight years after the allegedly tortious conduct began, thereby losing a substantial portion of its rights (if any) by application of Georgia's four-year statute of limitations.[30] We might have reached a

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[30] The mechanics of Georgia's statute of limitations have been explained as follows:

> The test to be applied in determining when the statute of limitations begins to run against an action sounding in tort is in whether the act causing the damage is in and of itself an invasion of some right of the plaintiff, and thus constitutes a legal injury and gives rise to a cause of action. If the act is of itself not unlawful in this sense, and a recovery is sought only on account of damage subsequently accruing from and consequent upon the act, the cause of action accrues and the statute begins to run only when the damage is sustained; but if the act causing such subsequent damage is of itself unlawful in the sense that it constitutes a legal injury to the plaintiff, and is thus a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, however slight the actual damage then may be.

Fox v. Ravinia Club, Inc., 202 Ga. App. 260, 414 S.E.2d 243, 244 (1991) (quotation omitted), *cert. denied*, No. A91A1136 (Ga. Feb. 4, 1992). As we understand the test, U.S. Anchor's cause of action (if any) continued to accrue with each predatory sale, and would be time-barred under O.C.G.A. § 9-3-31 with respect to each transaction occurring more than four years before commencement of the new action in state court. *See Cleveland Lumber Co. v. Proctor & Schwartz, Inc.*, 397 F. Supp.

(continued...)

different result under the Judicial Improvements Act of 1990, Pub.L. No. 101-650, § 310, 104 Stat. 5089, 5113-14, *codified at* 28 U.S.C. § 1367. Under 28 U.S.C. § 1367(d), the statute of limitations would be tolled while the claims were pending until 30 days after an order of dismissal, thus allowing the plaintiff time for filing a new action in state court without a lapse of its rights. But the present case was commenced before the statute's effective date on December 1, 1990, and § 1367 is not retroactive. *Yanez v. United States*, 989 F.2d 323, 327 n. 3 (9th Cir. 1993). In view of the fact that the case may be certified to the Supreme Court of Georgia for interlocutory resolution of the state law issues, we conclude that the balance of factors involved in the discretionary decision to retain pendent jurisdiction weighs clearly against dismissal.[31]

Accordingly, we respectfully certify the following questions of law to the Supreme Court of Georgia and the Honorable Justices of that Court.

Questions for Certification

1. DOES A GENERAL RELEASE UNDER GEORGIA LAW DISCHARGE LIABILITY FOR INJURY CAUSED BY SUBSEQUENT ACTS IN THE COURSE OF A SCHEME OR CONSPIRACY THAT WAS ONGOING

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[30] (...continued)
1088, 1094 (N.D. Ga. 1975) (citing *Georgia Power Co. v. Moore*, 47 Ga. App. 411, 170 S.E. 520 (1933)); *accord Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971) (federal antitrust law).

[31] We need not decide whether § 1367 would allow the court of appeals to decide the propriety of exercising supplemental jurisdiction or whether such discretion is vested in the district court alone.

AT THE TIME THE RELEASE WAS EXECUTED BUT UNKNOWN TO THE RELEASING PARTY?

2. DOES A GENERAL RELEASE UNDER GEORGIA LAW DISCHARGE LIABILITY FOR INJURY CAUSED BY TORTIOUS CONDUCT ALREADY COMMITTED THAT WAS UNKNOWN TO THE RELEASING PARTY AT THE TIME THE RELEASE WAS EXECUTED?

3. DOES THE TORT OF INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS ENCOMPASS PREDATORY PRICING BELOW SOME MEASURE OF THE DEFENDANT'S COSTS?

4. IF THE ANSWER TO QUESTION 3 IS YES, THEN IN A CASE OF ACTIONABLE PREDATORY PRICING BELOW SOME MEASURE OF COST BY A CONSPIRACY OR A SINGLE DEFENDANT, WHAT IS THE APPROPRIATE MEASURE OF THE DEFENDANTS' COSTS?

Our statement of the questions is not designed to limit the inquiry of the Supreme Court of Georgia. Instead, the Supreme Court has the widest possible latitude to consider the problems and issues involved in this case as it perceives them to be. *Martinez v. Rodriquez,* 394 F.2d 156, 159 n. 6 (5th Cir. 1968), *conformed to certified answer,* 410 F.2d 729 (5th Cir. 1969). To assist the Supreme Court, the entire record in this case and copies of the parties' briefs are transmitted herewith.

VIII. CONCLUSION

The judgment of the district court is reversed with respect to all federal law causes of action and judgment is rendered in favor of the defendants thereon. Dispositive questions of law respecting the plaintiff's state law causes of action are certified to the Supreme Court of Georgia.

REVERSED and JUDGMENT RENDERED in part and QUESTIONS CERTIFIED.

U.S. ANCHOR MANUFACTURING, INC., Plaintiff,

v.

RULE INDUSTRIES, INC. and Tie Down, Inc., a/k/a Tie Down Engineering, Inc., Defendants,

v.

William CHAPMAN and U.S. Anchor Manufacturing, Inc., Defendants in Counterclaim.

Civ. A. No. 86-CV-2447-JTC.

United States District Court,
N.D. Georgia,
Atlanta Division.

June 27, 1989.

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ORDER OF COURT

CAMP, District Judge

This matter is before the Court on defendant Tie Down, Inc.'s Motion for Summary Judgment; defendant Rule Industries, Inc.'s Motion for Summary Judgment and the motion of William Chapman and U.S. Anchor for Summary Judgment. For the following reasons, the above motions for summary judgment are DENIED. Defendant Tie Down's motion to file a supplemental brief and an amendment to this motion is GRANTED.

This is an action for treble damages and injunctive relief for alleged antitrust violations under Sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act. Plaintiff also alleges that defendants' actions constitute an unfair restraint of trade in violation of Article 3, Section VI, Paragraph V of the Georgia Constitution and O.C.G.A. § 13-8-2. Defendants seek summary judgment on all of plaintiff's theories for relief. Defendant Tie Down, Inc., a/k/a/ Tie Down Engineering, Inc. ("Tie Down") brings a counterclaim against plaintiff U.S. Anchor Manufacturing, Inc. ("U.S. Anchor") and William Chapman. This counterclaim alleges a breach of fiduciary duty; misappropriation of confidential business information; tortious interference with business relations; and common law fraud and deceit. U.S. Anchor and William Chapman seek summary judgment on Tie Down's theories for relief in its counterclaim.

I. FACTS

The present action involves several manufacturers and suppliers of fluke anchors. Anchors and other marine

industry products are generally sold by suppliers to wholesale distributors, who in turn sell the anchors to boat dealers, marinas, and other retailers for ultimate resale to the consumer, the boat owner. The supplier may either manufacturer its own anchors, as does U.S. Anchor, or purchase them from another domestic manufacturer, as Rule Industries, Inc. ("Rule") does from Tie Down, or import them from abroad.

In 1974, defendant Tie Down decided to expand its business of manufacturing anchoring mechanisms for mobile homes into the marine anchor business. Tie Down thus began manufacturing and selling inexpensive "generic" anchors under the "Hooker" tradename. These anchors were among the earliest fluke style anchors. In 1974, Tie Down expanded its Hooker line of anchors to include a fluke style anchor called the Danforth. Tie Down inexpensively duplicated the Danforth anchor, whose patent had expired, and sold it cheaply under the Super Hooker tradename.

Defendant Rule entered the recreational marine anchor business in 1983 when it acquired the Danforth line of anchors from the Eastern Company. In May 1985, Rule agreed to acquire Tie Down's marine anchor division, including its anchor inventory, certain machinery and equipment used in the manufacture of marine anchors, and a license to exclusive use of Tie Down's marine anchor trade names ("Hooker", "Super Hooker", and "Hugger") for seven years. In addition, Tie Down agreed not to sell anchors in competition with Rule for at least five years. Tie Down maintains that it negotiated this manufacturing agreement to recoup losses it suffered at this time.

Plaintiff U.S. Anchor was organized by William Chapman, Tie Down's former President, in the Spring of 1985 to compete with Rule and Tie Down in the sale of

inexpensive generic anchors. William Chapman was employed by Tie Down in January, 1979, and appointed President in July, 1984. Chapman maintains that he resigned in January, 1985, as President of Tie Down because of disagreements with Tie Down's owner, Chuck MacKarvich, over the proper methods of running the company and Chapman's lack of managerial authority. Chapman maintains that he did not contemplate starting a marine anchor company until after his January resignation, at which time, he generally advised MacKarvich that he might end up with some form of competition with Tie Down. Chapman maintains that it was not until April, 1985, when Tie Down entered into an agreement to sell its marine anchor division to Rule Industries, that he saw an opportunity to start a marine anchor company.

Defendant Tie Down, however, contends that Chapman actively prepared to go into business in competition with Tie Down while still serving as President of Tie Down. Tie Down alleges that in early 1985, while still employed by Tie Down, Chapman used Tie Down's resources, personnel and confidential business information to set up his competing business, U.S. Anchor. These allegations form the basis of Tie Down's counterclaim. MacKarvich testified that when he fired Chapman in late April, 1985, for making disparaging remarks about Tie Down, he did not know of Chapman's plans to compete in the marine anchor business.

Plaintiff now alleges that defendants have conspired to engage in, and have engaged in, predatory pricing and unlawful tying arrangements to eliminate plaintiff as a competitor and to achieve a monopoly in the relevant product market. Plaintiff maintains that it originally intended to set its prices at 10-12% below that of the previous season's prices; however, these prices never went into effect because

Rule immediately reduced its prices by 15% to undercut plaintiff's pricing. Plaintiff then maintains that it cut its prices and, in response, Rule lowered its prices by an additional 20%. Rule, however, argues that its price reductions were in response to the influx of cheaper anchors by foreign competitors.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c), Fed. R. Civ. P., defines the standard for summary judgment: Courts should grant summary judgment when "there is no genuine issue as to any material fact ... and the moving party is entitled to judgment as a matter of law." In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986), the Supreme Court interpreted Rule 56(c) to require the moving party to demonstrate that the nonmoving party lacks evidence to support an essential element of his claim. Thus, the movant's burden is easily "discharged by showing–that is, pointing out to the district court–that there is an absence of evidence to support the nonmoving party's case." Once the movant has met this burden, the opposing party must then present evidence establishing a material issue of fact. *Id.* The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, to demonstrate that a genuine issue of material fact does exist. *Id.* The Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986), "that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial."

"[S]ummary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can

have on legitimate price competition." *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 2110, 104 L.Ed.2d 670 (1989), *citing, Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574, 595, 106 S.Ct. 1348, 1360, 89 L.Ed.2d 538 (1986). Thus, an antitrust plaintiff must present evidence that tends, when interpreted in a light most favorable to plaintiff, to exclude the possibility that defendant's conduct was consistent with permissible competition as with illegal conduct. *Id.*

III. SHERMAN ACT CLAIMS

Plaintiff alleges a claim for attempted monopolization pursuant to § 2 of the Sherman Act; conspiracy and combination to monopolize pursuant to § 2 of the Sherman Act; and conspiracy to eliminate competitors in violation of § 1 of the Sherman Act. *See* 15 U.S.C. §§ 1, 2.

A § 1 Sherman Act claim for conspiracy to eliminate a competitor requires (1) an agreement to engage in anticompetitive conduct and (2) an adverse impact on the relevant market as an "unreasonable restraint of trade". *Hill Aircraft & Leasing Corporation v. Fulton County*, 561 F. Supp. 667, 676 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir. 1984).

To sustain a § 2 Sherman Act claim of attempted monopoly, a plaintiff must show: (1) the relevant product and geographic markets; (2) that the defendant had the specific intent to gain a monopoly position in the market; and (3) that there was a dangerous probability of *de facto* monopolization. *See American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); *Bill Beasely Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341,

1342 (11th Cir. 1983); *Photovest Corporation v. Fotomat Corporation,* 606 F.2d 704, 711-21 (7th Cir. 1979), *cert. denied,* 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed.2d 601 (1980). A § 2 claim for combination or conspiracy to monopolize requires proof of the same elements involved in an attempt claim with the exception that it is not necessary to show that the scheme to monopolize was ever "attempted to any harmful extent." *American Tobacco Co.,* 328 U.S. at 811, 66 S.Ct. at 1139.

All of the plaintiff's Sherman Act claims require defendant's intent to engage in anticompetitive conduct. Proof of predatory pricing can satisfy this element of intent for all three of plaintiff's Sherman Act claims. *Cargill v. Monfort of Colorado, Inc.,* 479 U.S. 104, 107 S.Ct. 484, 493, 93 L.Ed.2d 427 (1986); *McGahee* 858 F.2d at 1493. To establish a claim for predatory pricing, the plaintiff may show (1) that the defendants sold their product below the average total cost of its production; and (2) that because of such pricing, the defendants had a dangerous probability of success on their Sherman Act claims. *McGahee,* 858 F.2d at 1493.

A. *The Areeda-Turner Average Variable Cost and The Eleventh's Circuit's Test of Average Total Cost*

The Eleventh Circuit has recently rejected the test of Professors Areeda and Turner for determining predatory pricing claims. *See McGahee,* 858 F.2d at 1487, *citing,* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697,

733 (1975). In the past, binding authority[1] required that courts in this Circuit apply the Areeda & Turner test, and thus subjective intent was irrelevant. Instead, intent to engage in anticompetitive conduct through predatory pricing was determined through comparison between prices and average variable cost. *See International Air Industries v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). The average variable cost of production is "the costs associated with producing each individual unit of output" . . . "which do vary with production and roughly equal the cost of the resources necessary to produce additional units of output." *Adjusters Replace-A-Car v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 889 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1985).

The Eleventh Circuit, however, has recently held that circumstantial evidence of subjective intent to predatorily price for the purposes of monopolization is also relevant in determining antitrust injury. *McGahee*, 858 F.2d at 1487. The Eleventh Circuit also now determines predatory pricing by examining the "full" or "total" costs, the "average total costs." Average total cost is the sum of average variable cost and average fixed cost, and equates to the total economic cost of selling and delivering a product. *McGahee*, 858 F.2d at 1496, n. 22. To constitute a meaningful economic concept, total economic cost must also include a necessary minimum profit. *Id.* at 1503.

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[1] *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (decisions rendered by the former Fifth Circuit before October 1, 1981, are binding upon courts of the Eleventh Circuit).

The Eleventh Circuit three-part test that uses average total cost to infer predatory pricing is as follows:

> (1) "If a defendant's prices were above average total cost then there is no predatory pricing and thus no circumstantial evidence of predatory intent. Average total cost means the average of the total economic cost, which includes the necessary minimum profit. Average total cost should theoretically be measured by long run marginal cost, but in appropriate cases a surrogate for total cost may be used."
>
> (2) "If a defendant's prices were below average total cost and above short run marginal cost, then there is circumstantial evidence of predatory intent . . . . To withstand judgment as a matter of law, a plaintiff must have other evidence, either objective or subjective of predatory intent."
>
> (3) "If a defendant's prices were below short run marginal cost, then the circumstantial evidence is strong enough to create a rebuttable presumption of predatory intent . . . . If a defendant's prices were below short run marginal cost and the other evidence, subjective or objective, is sufficiently probative of defendant's predatory intent, then as a matter of law, defendant has the predatory intent required to establish the attempt to monopolize element of a Sherman Act claim . . . ."

McGahee, 858 F.2d at 1503-04.

As to parts (2) and (3) of this test, "average variable cost" may be used as a surrogate for short run marginal costs. *Id.* at 1504.

Applying this test, the Eleventh Circuit found that McGahee had presented sufficient evidence to create an issue of fact as to whether Northern Propane had the intent necessary for an attempt to monopolize claim. *Id.* at pp. 1504-05. The defendant did not maintain that its sales were above its average total cost during price wars. *Id.* at 1505. The defendant's own documents indicated that in some months it sold propane to commercial customers at prices below average variable cost. *Id.* at 1492, 1495, n. 12. Circumstantial evidence of predatory intent included the defendant's (1) investigation of McGahee's financial position; (2) its new policy of rent-free tanks designed to take advantage of McGahee's weak financial position; (3) its internal memoranda declaring a goal of contributing to McGahee's financial problems; and (4) its price reductions to particular customers. *Id.* at 1504, n. 41. This was sufficient evidence from which a fact finder could infer predatory intent.

Plaintiff has presented evidence from which a fact finder could infer predatory intent under both the Areeda-Turner test and the Eleventh Circuit's test in McGahee.[2] An issue of fact exists as to whether Rule sold certain anchor models below average variable cost. *See* Andrews First Affidavit ¶ 9; Moody Deposition, pp. 55-63, 99; Anastoes Affidavit, ¶ 4. A question of fact also exists as to whether defendant Tie Down was selling to Rule at prices below Tie Down's average variable costs on certain anchor models.

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[2] The court notes that the standard for cost analysis to determine predatory pricing changed from the Areeda-Turner average variable cost to average total cost, as announced in *McGahee* while the motions for summary judgment were pending in this court. Therefore, the parties first submitted evidence in accordance with the average variable cost. The parties have subsequently presently evidence in accordance with the average total cost standard.

See Andrews Affidavit, ¶ 6-9, Exhs B-D; Appendix I to Tie-Down's Brief in Support of Summary Judgment. The Eleventh Circuit specifically stated in *McGahee* that a district court must not resolve factual disputes by weighing conflicting evidence of average variable costs. *McGahee*, 858 F.2d at 1495, n. 12.

Under the less stringent test of *McGahee*, plaintiff has also presented enough evidence to withstand summary judgment on the issue of predatory intent. As seen, this test is based on sales below average total costs. *Id.* at 1503. Plaintiff has submitted a second affidavit of its expert, John Andrews, that analyzes defendants' pricing in relation to their average total costs. The second affidavit analyzes defendants' average total costs, which includes both variable costs and fixed costs as well as a reasonable profit or return on shareholder equity.[3] Dr. Andrews concluded that Rule consistently sold every single anchor model to its customers at prices that were less than Rule's average total cost for each model from December, 1985, through April, 1988.

In rebuttal, Tie-Down contends that Andrews' calculations for both average variable cost or average total costs are erroneous because he did not consider the quantity of units produced. Because the per unit cost varies with the quantity of units produced, a costing analysis that does not consider the quantity of units produced cannot provide an accurate average variable cost or average total cost computation.

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[3] Andrews' first affidavit analyzed average variable costs, which excluded any consideration of indirect or fixed costs or of any profit margin.

Andrews' analysis of both the average variable costs under the Areeda-Turner test and under the Eleventh Circuit's average total costs test takes output into account. In calculating both average variable cost and average total cost, Andrews arrived at the total costs of parts required for each anchor by examining the actual manufacturing invoices of the steel, galvanizing, slitting services, and related freight costs at varying points in time from Tie Down's steel and galvanizing vendors. andrews Affidavit pp. 6-7, and Deposition, p. 38. From these invoices, Andrews determined the steel cost per part by multiplying the steel required to produce the part by the steel cost per pound. *See* Exhibits B-D to Andrews Deposition, filed March 6, 1989. Andrews obtained the figure for the steel cost per pound from weights from Tie Down's cost analyses. *See* Andrews Deposition, p. 27; Exh. 9; and Mackarvich Exh. 31. Therefore, Andrews took into account the output by determining from the actual invoices for raw materials the price of steel used per part, based on Tie Down's own figures.

Andrews followed a similar method for determining the amount of labor expended on each anchor part. *See* MacKarvich Exh. 31. By adding together these amounts, Andrews then came up with the total cost of parts for each anchor. To this amount, Andrews added the cost of direct labor to weld the anchor parts together and the galvanizing cost. Andrews also determined the cost of this direct labor from Tie Down's internal numbers. Andrews Affidavit ¶ 7; Andrews Deposition, p. 41. He then calculated the cost of galvanizing, slitting services, and related freight costs at varying points in time from a review of all actual invoices from Tie Down's steel and galvanizing vendors. Andrews Affidavit ¶ 7 and Deposition p. 38. While defendants may contest the evidence upon which these calculation are based,

this manner of calculation considers Tie Down's actual output.

To this total cost for material and direct labor, Andrews then added a variable overhead cost factor which was derived from the financial statements, trail balances and work papers prepared by Tie Down's independent accounting firm. *Id.;* Affidavit ¶ 7; and Deposition pp. 41-44. Defendant's have not contested the computation of this variable overhead cost calculation.

Defendants also maintain that Andrews' calculations for average total cost are inaccurate because they are based on speculation and erroneous assumptions. Defendants allege Andrews selectively picked the highest coil steel prices from Tie Down's invoices upon which to base his calculations of steel costs; therefore, Andrews' coil steel costs are not representative of the costs actually experienced by Tie Down. Defendants also maintain that Andrews' average total cost calculations are based on an erroneous scrap factor, arbitrarily selected by Andrews based on the scrap factor of U.S. Anchor, a smaller company which does not have the same purchasing power or efficiency as Tie Down. Andrew's coil steel cost also allegedly include incorrect shipping costs from the steel company to the slitter and incorrect freight cost from the slitter to Tie Down, and erroneous slitting and galvanizing costs. Defendants further allege that Andrews has used an erroneous "imputed profit" in his calculations of average total cost.

Again, the contested evidence about calculations of average total cost is exclusively for the jury. *McGahee,* 858 F.2d at 1495, n. 12. Moreover, several instances in which sales were below average variable costs, and presumably average total costs, are sufficient to overcome summary judgment and create an issue of fact under the Eleventh

Circuit test for predatory pricing. *Id.* The amount of profit to be calculated into total economic costs is also an issue of fact. *Id.* at 1503, n. 35. Andrews expert opinion about the amount of profit to be included in average total cost is based on the average operating results for profitable companies engaged in the business of manufacturing fabricated metal products. *See* Exh. D attached to Andrews Second Affidavit. This evidence is sufficient to create a fact question as to the amount of profit to be included in average total costs.

The Eleventh Circuit's adoption of an average total cost standard in *McGahee* came at the close of discovery and after motions for summary judgment had been filed in this case. The average total cost is a more liberal standard than the Areeda-Turner average variable cost standard because it takes into account total cost. Plaintiff has presented sufficient evidence to create an issue of fact about below average variable cost. The Eleventh Circuit notes that average variable costs may be used as a substitute for short run marginal costs. *McGahee,* 858 F.2d at 1504. Andrews' First and Second Affidavits support such a substitution in the present case. *Id.* at n. 38. Therefore, under the Eleventh Circuit test, an issue of facts exists as to whether defendants priced below the short run marginal cost, based on the contested evidence of pricing below average variable cost.

Under *McGahee,* subjective evidence of predatory pricing must also be considered, in addition to cost analysis. Subjective evidence exists in the present case similar to that which existed in *McGahee.* Plaintiff has raised evidence that defendants investigated plaintiff's financial position and that defendants instituted new credits and discounts that plaintiff could not match. Webb Affidavit, ¶ 7; Humphrey Deposition, pp. 87-92; Gardner Deposition, p. 28; Hymel Deposition, pp. 19-20; Pressman Deposition, pp. 17-18;

Read Deposition, pp. 39, 67; Chapman 7/15/87 Deposition, p. 56. Defendants' internal memoranda reflect a goal of contributing to U.S. Anchor's financial problems. Bracco Deposition, Exh. 6, p. 2; Anastoes Deposition, Exhs. 11 and 2; and defendant reduced its prices to particular customers and offered new discounts. Anastoes Deposition Exh. 14.

B. *Dangerous Probability of Success*

The second requirement of an attempt to monopolize claim is "a dangerous probability of the defendant would succeed." *McGahee,* 858 F.2d at 1493. "[A] court must examine the relevant market and defendant's market power *before* the attempt to monopolized began . . . . The best test from which market power may be inferred is relative size, *i.e.,* the percentage of market share." *Id.* at 1505. In *McGahee,* the court held that "a sixty or sixty-five percent market share is sufficient to create an issue of fact as to whether there was a dangerous probability" that the defendant could succeed in achieving monopoly. *Id.* at 1506.

Defendants argue that they are entitled to summary judgment because they do not possess nor do they come close to possessing monopoly power in the relevant market. An issue of fact, however, exists as to the relevant product and geographic markets.[4] The relevant geographic market

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[4] Defendants maintain that plaintiff's evidence is not expert economic evidence of the relevant market share because James Webb and Gary Potter are not economists. *American Key Corporation v. Cole National Corporation,* 762 F.2d 1569 (11th Cir. 1985). Federal Rule of Evidence 702, however, provides that a witness may qualify as an expert "by knowledge, skill, experience, training, *or* education." (emphasis added). Potter and Webb's affidavits reflect extensive knowledge, skill,

(continued...)

area is in dispute. Plaintiff maintains that the geographic market is the continental United States. *See* Response to Second Interrogatories, No. 5; Chapman Deposition 7/15/87, p. 131. In contrast, defendants contend that the relevant geographic market is the United States and Canada. *See* Anastos Deposition, p. 97.

The parties also dispute the relevant product market with evidence, based on affidavits and depositions. Plaintiff claims that the relevant product market includes lightweight, galvanized penetrating anchors sold by U.S. Anchor and by Rule, including Rule's trademarked Danforth Standard models. Defendant's limit this product market definition to "generic" galvanized penetrating fluke-style anchor. Defendants' definition includes only seventeen anchor models manufactured by Tie Down, falling into the Super Hooker, Hooker Economy, and Hooker Slip-Ring anchors, [the "Hooker" line] and includes all anchor models manufactured by U.S. Anchor. Defendants' product market definition, however, excludes the Danforth Standard models.

The existence of a monopoly power is intertwined with the definition of the relevant product and geographic market. The question of relevant markets is ordinarily one for the ju . *Associated Radio Service*, 624 F.2d 1342, 1357 (5th Cir. 1980). The court agrees with plaintiff that these factual issues are disputed. Since the relevant markets are contested, the court cannot assess the defendants' arguments that low entry barriers and foreign competition preclude plaintiff's monopolization claims. Summary judgment, based on defendants' argument that they lacked a monopoly power

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[4] (...continued)
experience, and training in determining markets in the marine anchor industry. Accordingly, the court finds their evidence to be sufficient expert testimony.

in the relevant market, must be denied on plaintiff's Sherman Act claims.

IV. EXCLUSIVE DEALING CLAIM UNDER § 1 OF SHERMAN ACT AND § 4 OF CLAYTON ACT

Plaintiff also alleges that Rule imposed an exclusive dealing arrangement upon its customers in violation of § 1 of the Sherman Act and § 4 of the Clayton Act. Plaintiff maintains that this tying arrangement further evidences Rule's intent to monopolize and to eliminate U.S. Anchor in violation of § 1 and § 2 of the Sherman Act. This alleged tying arrangement would also constitute an independent violation of § 3 of the Clayton Act.

Exclusive dealing arrangements violate § 3 of the Clayton Act, 15 U.S.C. § 14. Section 3 of the Clayton Act makes it unlawful to sell goods on the condition, agreement, or understanding that the purchaser shall not use or deal in the goods of a competitor of the seller, where the effect may be to substantially lessen competition or tend to create a monopoly. These types of tying arrangements are recognized as "inherently anticompetitive" because they tend to shut other sellers out of the market by "tying up" potential distributors or buyers. *Brown Shoe Co. v. United States*, 370 U.S. 294, 330, 82 S.Ct. 1502, 1526, 8 L.Ed.2d 510 (1962); *United States v. Loew's, Inc.*, 371 U.S. 38, 44-45, 83 S.Ct. 97, 101-102, 9 L.Ed.2d 11 (1962); *Barry Wright Corporation v. ITT Grinnel Corporation*, 724 F.2d 227, 236 (1st Cir. 1983).

In the present case, the plaintiff alleges that Rule engaged in an "exclusive dealer" tying arrangement. In this type of illegal tying arrangement, the seller conditions the

sale of his product upon the buyer's promise not to buy similar products from the seller's competitors. *Northern Pacific Railway v. United States,* 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

Plaintiff's tying claim is based on the fact that defendant Rule allegedly conditioned the sale of its new "Deepset" anchor upon the customer's promise not to buy galvanized penetrating fluke-style anchors from any other manufacturer. In September, 1985, Rule introduced the Deepset anchor line, which it described as a new and revolutionary product. Anastos Affidavit, ¶¶ 5-6. For two years thereafter Rule refused to sell this product to any customer who bought galvanizing penetrating fluke-style anchors from any source other than Rule. This fact has been confirmed by Rule's literature and Rule's customer's. Anastos Deposition, Exh. 11, 21, 22; York Deposition, pp. 23-26, 46; Howerth Deposition, pp. 12-14 and Exh. 1; Pressman Deposition, \pp. 15-16 and Exh. 1; Landrith Deposition, pp. 35, 44-46 and Exh. 1; Bouchard Deposition pp. 28-29.

An exclusive dealership is illegal if it is probable that the arrangement will foreclose competition in a substantial share of the line of commerce affected. *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 327, 81 S.Ct. 623, 627, 5 L.Ed.2d 580 (1960). To determine whether this has occurred, it is necessary to (1) identify the "line of commerce" involved; (2) identify the market area in which the defendant seller operates; and (3) determine whether the opportunities foreclosed by the exclusive dealing arrangement constitute a "substantial share" of the market in that area. *Id.* at 327-28, 81 S.Ct. at 627-28.

As seen, the evidence regarding the appropriate product and geographic markets is a contested factual issue

appropriate for the jury's determination. Plaintiff's exclusive dealing arrangement claim is intertwined with these definitions. Accordingly, summary judgment on plaintiff's exclusive dealing claim under § 1 of the Sherman Act and § 3 of the Clayton Act would be inappropriate.

V. PLAINTIFF'S OTHER CLAIMS

In Count V, plaintiff incorporates its previously stated allegations to state a claim under Georgia law for conspiracy to restrain trade in violation of Article 3, Section VI, Paragraph V of the Georgia Constitution and O.C.G.A. § 13-8-2. Plaintiff also seeks injunctive relief under the federal antitrust laws. Because issues of fact appropriate for the jury exist regarding whether there has been any unlawful conspiracies to restrain trade, threat of anticompetitive effect in the marketplace, or injury caused by any illegal conduct, defendants' motion for summary judgment on these claims must be denied.

VI. DEFENDANT TIE DOWN'S COUNTERCLAIM

Defendant Tie Down brings a counterclaim against plaintiff U.S. Anchor and William Chapman. This counterclaim alleges a breach of fiduciary duty; misappropriation of confidential business information; tortious interference with business relations; and common law fraud and deceit. U.S. Anchor and William Chapman seek summary judgment on Tie Down's theories for relief in its counterclaim.

Defendant Tie Down contends that Chapman actively prepared to go into business in competition with Tie Down while still serving as President of Tie Down. Tie Down

alleges evidence that in early 1985 while still employed by Tie Down, Chapman used Tie Down's resources, personnel and confidential business information to set up his competing business, U.S. Anchor. These allegations form the basis of Tie Down's counterclaim.

A. *Breach of Fiduciary Duty*

As an officer of Tie Down and possibly as an employee of Tie Down, Chapman would have owed the corporation and his principal a fiduciary duty of good faith and loyalty. *See* O.C.G.A. § 14-2-152; O.C.G.A. § 23-2-58; *General Information Processing Systems, Inc. v. Sweeney,* 176 Ga. App. 315, 316, 335, S.E.2d 722 (1985); *Cochran v. Murrah,* 235 Ga. 304, 219 S.E.2d 421 (1975). An employee breaches no fiduciary duty to the employer simply by making plans to enter a competing business while he is still employed. *E.D. Lacey Mills, Inc. v. Keith,* 183 Ga. App. 357, 362, 359 S.E.2d 148 (1987). However, an employee is not "entitled to solicit customers for [a] rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business." *Id.* at 363, 359 S.E.2d 148, *citing,* Restatement 2nd of Agency, § 393 (1958). This fiduciary duty is also violated by making numerous arrangements for the competing business while still employed and by soliciting the employer's customers and sales representatives for the rival business. *Id.*

Chapman maintains that he did not contemplate starting a marine anchor company until after his January resignation, at which time he generally advised MacKarvich that he might end up in some form of competition with Tie Down. It was not until April 1985, when Tie Down entered into an agreement to sell its marine anchor division to Rule Industries, that he allegedly saw an opportunity to start a

marine anchor company. Chapman contends that he did not solicit orders for U.S. Anchor from Tie Down's customers, or any potential customer, until approximately July, 1985, at least three months after the termination of his employment at Tie Down. Statement ¶ 30.

Tie Down has presented evidence that Chapman made significant business arrangements to organize a competing business and solicited Tie Down's sales agents while still employed by Tie Down. This evidence raises a genuine issue of fact for trial as to Tie Down's amended counterclaim breach of fiduciary duty. Accordingly, U.S. Anchor's and Chapman's motion for summary judgment on Tie Down's counterclaim is denied.

B. *Misappropriation of Confidential Business Information and Common Law Fraud and Deceit*

U.S. Anchor and Chapman also seek summary judgment on Tie Down's amended counterclaim for misappropriation about confidential business information and common law fraud and deceit. These claims are based on similar facts of whether Chapman obtained Tie Down's confidential business information through fraudulent misrepresentations or theft.

A cause of action for misappropriation of confidential business information exists when "[o]ne who, for the purposes of advancing a rival business interest, procures by improper means information about another's business . . . ." Restatement of Torts § 759. *Wesley-Jessen, Inc. v. Armento,* 519 F. Supp. 1352, 1361 (N.D. Ga. 1981); *Durham v. Stand-by Labor, Inc.*, 230 Ga. 558, 563, 198 S.E.2d 145 (1973). "Improper means" may include theft or fraudulent misrepresentation.

To establish a claim for fraud, a party must prove the following elements:

(1) The defendant made the representations;

(2) At the time the representations were made, the defendant knew they were false;

(3) The defendant made the representations with the intention and purpose of deceiving the plaintiff;

(4) The plaintiff relied on the representations;

(5) The plaintiff sustained the alleged loss and damage as the proximate result of the representations having been made.

Bragg v. Sirockman, 169 Ga. App. 643, 314 S.E.2d 478 (1984).

A cause of action for fraud may also arise when the failure to perform the promised act, even as to a future event, is coupled with a present intention not to perform. *Hayes v. Irwin,* 541 F. Supp. 397, 438 (N.D. Ga. 1982), *citing Dye v. Dye,* 231 Ga. 533, 202 S.E.2d 418 (1973); *Cowart v. Gay,* 223 Ga. 635, 157 S.E.2d 466 (1967). An opinion as to a legal matter is actionable if there is a fiduciary relationship between the parties. *See Capriulo v. Bankers Life Co.,* 178 Ga. App. 635, 637-38, 344 S.E.2d 430 (1986); *Clinton v. State Farm Mutual Automobile Insurance Co.,* 110 Ga. App. 417, 138 S.E.2d 687 (1964).

U.S. Anchor and Chapman have presented evidence by affidavit that Chapman did not possess or use any of Tie Down's confidential or proprietary business information.

Chapman also maintains that his knowledge of manufacturing anchors, as well as the identity of potential anchor customers, was subjective knowledge, and was not derived from any confidential documents wrongfully obtained or retained outside the course of his normal employment. Statement, ¶ 29.

In rebuttal, Tie Down has presented evidence that Chapman obtained access to Tie Down's costing information for use in U.S. Anchor's business plan and gross profit analysis by misrepresenting to MacKarvich that he wanted to help recost Tie Down's products for Tie Down's benefit. MacKarvich Affidavit, ¶ 8. Tie Down also points to circumstantial evidence that Chapman misappropriated Tie Down's marine anchor engineering drawings, which were discovered missing upon Chapman's discharge from Tie Down. MacKarvich Affidavit, ¶ 9. U.S. Anchor's machinist, however, testified that the tooling and dies were not made or based on any of Tie Down's engineering drawings. Accordingly, there is an issue of fact that precludes summary judgment as to whether Chapman obtained confidential business information by improper means.

C. *Tortious Interference With Business Relations*

U.S. Anchor and Chapman seek summary judgment on Tie Down's amended counterclaim for tortious interference with business relations. A claim based on tortious interference with business relations does not require evidence of a binding contract. *Integrated & Micro Systems Inc. v. NEC Home Electronics,* 174 Ga. App. 197, 200, 329 S.E.2d 554 (1985). Instead, the party charged with tortious interference with business relations must have "(1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or

parties not to enter into or continue a business relationship with the plaintiff, and (4) for which the plaintiff suffered some financial injury." *Id., quoting, Hayes v. Irvin,* 541 F. Supp. at 429.

Interference with an employment relationship can be tortious, even though the employment is at the will of the employer and employee. *See e.g., E.D. Lacey Mills, Inc. v. Keith,* 183 Ga. App. at 362, 359 S.E.2d 148; *Nager v. Lad'N Dad Slacks,* 148 Ga. App. 401, 403, 251 S.E.2d 330 (1978); *Architectural Manufacturing Co. v. Airotec,* 119 Ga. App. 245, 248, 166 S.E.2d 744 (1969). Interference with the plaintiff's relationship with its customers, suppliers, or representatives will support a cause of action for tortious interference even though such relationships may be terminable at will. *E.D. Lacey Mills, Inc. v. Keith,* 183 Ga. App. at 362, 359 S.E.2d 148.

Interference with business relations may be excused if privileged. *Orkin Exterminating Co., Inc. v. Martin Co.,* 240 Ga. 662, 667, 242 S.E.2d 135 (1975). "[I]n order for [the defendant] to come under the protection of the competition privilege, it must establish inter alia that it did employ improper means." *Integrated & Micro Systems Inc.,* 174 Ga. App. at 202, 329 S.E.2d 554. The privilege defense is not available where interference is achieved through actions taken in violation of a confidential relationship. *Hayes v. Irwin,* 541 F. Supp. at 430; *E.D. Lacey Mills, Inc. v. Keith,* 183 Ga. App. at 364, 359 S.E.2d 148.

Chapman and U.S. Anchor argue that Tie Down cannot maintain this claim because Tie Down has only one marine anchor customer, Rule, since the inception of U.S. Anchor, and U.S. Anchor has never sold to Rule. Tie Down allegedly has not pointed to evidence that U.S.

Anchor and Chapman induced Rule, the only party doing business with Tie Down, not to enter or to continue the business relationship.

The disputed evidence, however, is not limited to Tie Down's relationship with Rule. The parties dispute whether Chapman wrongfully interfered with Tie Down's business relations by soliciting Tie Down's key employees, mobile home and marine anchor sales representative, and marine anchor distributors. Tie Down maintains that Chapman made such solicitations while still employed at Tie Down in violation of the confidential relationship owed Tie Down; therefore, no privilege exists.

Based on the above evidence, factual disputes exist, which are appropriate for the jury on Tie Down's amended counterclaim for tortious interference with business. Accordingly, summary judgment on this claim is also denied.

VII. CONCLUSION

In sum, defendant Tie Down, Inc.'s Motion for Summary Judgment, defendant Rule Industries, Inc.'s Motion for Summary Judgment, and the motion of William Chapman and U.S. Anchor for Summary Judgment are all DENIED. Defendant Tie Down's motion to file a supplemental brief and an amendment to this motion is GRANTED.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

U.S. Anchor Mfg., Inc.	:	
	:	
Plaintiff,	:	
	:	**CIVIL ACTION FILE NO.**
v.	:	**1:86-CV-2447-JTC**
	:	
Rule Industries, Inc. and	:	
Tie Down, Inc. a/k/a	:	
Tie Down Engineering, Inc.,	:	
	:	
Defendants.	:	

ORDER

This action is presently before the court on plaintiff's emergency motion for expedited ruling on plaintiff's motion for injunctive relief; on plaintiff's motion for permanent injunction [#325-1]; on defendant Rule's motion to stay execution of judgment without bond [#346-1], or for reduced bond [#346-2]; on defendant Tie Down's motion to stay execution of judgment without bond [#347-1], or in the alternative for reduced bond [#347-2]; on defendant Tie Down's motion to stay execution of judgment without bond [#347-1], or in the alternative for reduced bond [#347-2]; on defendant Tie Down's motion for J.N.O.V. [#348-1], or in the alternative motion for new trial [#348-2]; on defendant Rule's motion for J.N.O.V. [#349-1]; on defendant Rule's motion for new trial [#350-1]; on the Daniels' motion to withdraw as counsel of record for defendant Tie Down [#351-1]; on plaintiff's motion to register judgments in other districts [#352-1]; on plaintiff's motion to compel defendants

to post a supersedeas bond [#353-1]; on defendant Rule's motion for attorney's fees and costs regarding the deposition of Dr. Willard Mueller [#363-1]; and on plaintiff's motion to hold defendant Rule in civil contempt [#369-1].

I. MOTION TO WITHDRAW

Harold T. Daniel, Jr. and Laurie Webb Daniel, attorneys of record for the defendant Tie Down Engineering, move this court to allow them to withdraw as attorneys of record.

Pursuant to Local Rule 110-5 of the United States District Court for the Northern District of Georgia, counsel's motion appropriately states that the client has been given ten days notice of their intention to withdraw, contains copy of said notice, and includes a certificate of service upon opposing counsel.

The reason given for the Daniels' withdrawal is that defendant Tie Down is in arrears with its payments to the firm in excess of $285,000.00. Plaintiff does not object to the withdrawal so long as the result would not result in any delay to any post-trial matters or appeals. Tie Down Engineering, responding through the voice of its president, Charles MacKarvich, strenuously objects to the Daniels' withdrawal as counsel to Tie Down. Tie Down points out that it has already paid the Daniels $690,601.00 and has offered to pay all ongoing fees.

While the court sympathizes with the position of Tie Down, the court cannot force these parties into an amicable working relationship. On the other hand, it would be extremely difficult for new counsel to undertake representation of this case for the remaining post-trial

motions without extensive time and expense needed to familiarize itself with the case. Accordingly, the court DENIES the Daniels' motion to withdraw as counsel for defendant Tie Down. However, the court will grant the Daniels leave to renew their motion upon the disposition of the post-trial motions now pending before this court.

II. MOTION FOR EXPEDITED RULING ON MOTION FOR PERMANENT INJUNCTION

Anchor moves the court for an expedited ruling on its motion for permanent injunction on the grounds that Rule's newly published price list remains at the same predatory price levels as before. Because the court will rule on the motion for permanent injunction in this order, plaintiff's motion for expedited ruling in (sic) DENIED AS MOOT.

III. MOTION FOR CONTEMPT AND MOTION FOR ATTORNEY'S FEES AND COSTS REGARDING THE MUELLER DEPOSITIONS

The parties have filed a consent order with the court agreeing to extend the time in which to file briefs on the motion for costs and attorney's fees for the Mueller deposition. In light of this extension of time, the court DEFERS ruling on this motion until the time agreed to by the parties to prepare this issue has expired.

The parties have filed a letter with the court dated August 26, 1991 stating that the motion for contempt is withdrawn. Accordingly, this motion is MOOT.

IV. MOTION FOR PERMANENT INJUNCTION

Plaintiff files a motion with the court for permanent injunction. Specifically, plaintiff seeks to enjoin defendants from violating Sections 1 and 2 of the Sherman Act. Plaintiff contends that it is entitled to this relief in that the jury verdict found against defendants, that evidence of predatory pricing was produced at trial, and that overwhelming evidence exists to show that defendants conspired to monopolize and to eliminate competition. Finally, plaintiff contends that it will go out of business if it is not freed from defendants' unfair pricing.

Courts consistently recognize injunctions as an extraordinary or drastic remedy. *Ritter v. Smith*, 811 F.2d 1398 (11th Cir.), *cert. denied*, 483 U.S. 100 (1987). Injunctive relief should not be granted unless the movant can show the threat of irreparable harm and a lack of an adequate remedy at law. Here, the court finds that plaintiff's remedy at law is adequate. The jury awarded plaintiff some $1.6 million dollars, which when trebled will amount to approximately $5 million in damages. This should have some deterrent effect upon defendant. Generally, if damages are available, the remedy at law is adequate. *United States v. Jefferson County*, 720 F.2d 1511, 1519-20 (11th Cir. 1983).

The court has the authority to issue injunctive relief to restrain the commission of "related unlawful acts" once it finds that certain acts were committed in violation of the law. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 133 (1969). The court "has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct." *Id.* at 132.

While this is true, the court can find no cases, nor does either party supply the court with any cases, in which a court issued an injunction under similar circumstances involving predatory pricing. Plaintiff contends that it is entitled to injunctive relief because Rule's 1992 price listing cites prices identical to the 1991 prices which the jury found to be predatory.

Even though the prices remain the same, defendant argues that this does not automatically warrant the conclusion that the prices are predatory. First, defendant states that acquisition costs of the Hooker line are now fully amortized and thus can no longer be considered in assessing defendant's average total cost. This amount was included in the figures assessed and found to be predatory by the jury. Second, the defendant argues that its market share in 1985 was approximately 80% (based on a combined market share of Rule and Tie Down), which served as a basis for the jury's findings of predatory pricing. However, defendant asserts that its current market share is somewhere between 25 and 45%, depending upon what factors are included. This, defendant argues, eliminates its ability to currently engage in predatory pricing. Finally, defendant asserts that the substantial jury award to plaintiff strengthens its financial outlook and presence in the market. The court, in reviewing these factors, finds that injunctive relief is inappropriate.

The court agrees with defendant that the fact that the jury found defendant Rule to have engaged in predatory pricing does not necessarily compel the same result today. The change in market shares reflects a change in circumstances which may amount to ordinary competition. Accordingly, the court finds that there is no threat of irreparable injury arising from "related unlawful acts."

The court finds other reasons as well to be persuasive for denying the injunction. Injunctive relief is generally denied by courts where the court must continually supervise the relief. *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 148 (D.C. Cir. 1983); Wright & Miller, *Federal Practice & Procedure Civil 2d:* § 2942. In this case, to continually review the setting of Rule's prices, which admittedly take into consideration a variety of factors, would not only require continual court supervision, but would also require a mini-trial into prices each time an allegation of non-compliance was made to determine whether Rule was pricing below the average variable price or the average total cost of producing the merchandise. This is precisely the type of situation where injunctive relief becomes inappropriate because of the extensive court supervision that would be necessary.

For the foregoing reasons, the court finds that plaintiff is not entitled to an injunction against Rule Industries 1992 price list. Accordingly, plaintiff's motion for permanent injunction is DENIED.

V. MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. *Rule*

Defendant Rule states that the evidence is insufficient as a matter of law to support the jury verdict, which entitles them to Judgment notwithstanding the verdict. Specifically, defendant Rule argues six grounds in support of this contention. First, Rule states that plaintiff failed to establish any dangerous probability that Rule engaged in below-cost pricing in the relevant market. Second, Rule argues that

plaintiff never established the relevant market or the market share of the parties. Third, Rule contends that plaintiff failed to present evidence to establish that Rule engaged in below-cost pricing. Fourth, Rule argues that the weight of the evidence fails to support a finding of predatory pricing. Fifth, Rule argues that no plausible evidence was introduced in support of the conspiracy between Rule and Tie Down. Finally, Rule contends that the court erred by sending the release to the jury.

On a motion for JNOV, the court must consider all of the evidence in the light most favorable to the party opposed to the motion. *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1172 (11th Cir. 1991). The court should grant the motion only if in so doing the "facts and inferences point so strongly in favor of one party that reasonable persons could not disagree. . . ." *Id.* However, "if reasonable persons could reach different conclusions, the motion will be denied." *Id.* The court may not reweigh the evidence or reassess the credibility of witnesses or evidence. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1556 (11th Cir. 1990).

Defendant argues that it is entitled to a JNOV because, based on the evidence presented at trial, it was implausible that Rule attained or maintained a monopoly. In support of this contention, Rule makes several specific arguments, each of which the court will address in turn.

1. *Dangerous Probability of Success*

First, Rule argues that all counts of plaintiff's claims include the element of "dangerous probability of success" through the requirement of predatory pricing. While it is true that all of plaintiff's claims are based upon a predatory pricing theory of anti-competitive acts, not all counts require

proof of a dangerous probability of success. Only the attempt to monopolize claim, brought under Section 2 of the Sherman Act required a dangerous probability of success. *See* Final Jury Charges. The defendant's argument confuses the issues. Both the attempt to monopolize claim and the conspiracy to monopolize claim require specific intent on the part of the defendant, which can be shown by proof of predatory pricing. *See McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

Predatory pricing can be shown through a variety of methods. First, if the prices were above Rule's average total cost, then there is not evidence of predatory pricing or predatory intent. If the prices were below average total cost and above average variable cost, then there is circumstantial evidence of predatory intent. If prices fell below average variable cost, then there is a rebuttable presumption that Rule acted with predatory intent. *McGahee*, 858 F.2d at 1503. Thus, the court concludes that predatory pricing and dangerous probability of success are separate, although interrelated, concepts.

Because dangerous probability of success is not an element of each claim presented by plaintiff, and because the jury awarded plaintiff damages as to each claim, the verdict would stand even if there were no evidence of dangerous probability of success to support the Sherman Act Section § (sic) 2 "Attempt to Monopolize" claim. However, this court finds that even if this were not so, there was sufficient evidence before the jury for them to conclude that a dangerous probability of success existed.

Defendant Rule argues that there could be no dangerous probability of success for numerous reasons. First, it argues that the finding of a dangerous probability of

success depends of (sic) driving Anchor out of business, and without evidence that Anchor was likely to go out of business, this element could not be met.

In order to examine the issue of a dangerous probability of success, courts are to look to the power of the defendant to achieve the monopoly before the attempt began. *McGahee*, 858 F.2d at 1505. "'Monopoly' power exists in a geographic market if one competitor has the power to raise prices to supracompetitive levels or has the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market." *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1581 (11th Cir. 1985). In this case evidence was produced to show that at the time the predatory pricing scheme was entered into, defendant Rule, operating in tandem with its distributor Tie Down, had the majority of the market share. There was additional evidence before the jury concerning Rule's ability to monopolize the market, such as Rule's multi-product line, and barriers to entry in the market to name a few. Thus, there was evidence before the jury that Rule had the power to achieve a monopoly position in the market.

Furthermore, the position espoused by defendant -- namely that the plaintiff succeeded in responding to the defendant's actions, thereby foiling the attempt to monopolize prevents a finding of dangerous probability of success -- was rejected in *Multiflex v. Samuel Moore, Inc.*, 709 F.2d 980, 992 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). The court agrees with the reasoning that the effort to monopolize need not have been successful in order to assess liability under this section of the Sherman Act.

Dangerous probability of success is a jury issue. *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d

795, 801 (8th Cir. 1987). If any evidence exists to support a jury finding that the elements of the claim were proven, the verdict must be upheld. *Id.* Here sufficient evidence exists to support the jury verdict. Accordingly, the court rejects defendant's argument that the dangerous probability of success element of the attempt to monopolize claim was lacking due to the fact that plaintiff was not driven from business.

Second, the defendant argues that plaintiff failed to present evidence to show that it could "recoup" or eliminate its competition and charge supracompetitive prices and prevent new entrants to the market. The essence of this analysis is the entry barriers into the market. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592 n. 16 (1986).

Dr. Mueller testified as to entry barriers. Rule argues that a reasonable person would not place any merit in his theories. However, other market participants also testified that it was unlikely that any new entrant would attempt to penetrate this market following the stronghold created by the Rule/Tie Down merger. The court finds ample evidence in the record to support the jury's implicit finding that entry barriers exist in the generic anchor market.

Third, defendant argues that Rule's market share precluded a predatory pricing claim. The first price cut in this case was alleged to have occurred somewhere between October and November of 1985. While market share is a good indicator of ability to engage in predatory pricing, *McGahee*, 858 F.2d at 1505, market share is not the only indicator of a business' ability to predatorily price. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n. 15 (1986); *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 724, 725 n. 32 (5th Cir. 1972),

cert. denied, 424 U.S. 943 (1976). In this instance, plaintiff argued that defendant had a 90% market share at the time the 1985-86 anchor season commenced. Plaintiff contended that the price cut occurred prior to its first anchor sale. Additional price cuts continued into December of 1985. This evidence alone would be sufficient for the jury to find that the defendant had the power to predatorily price its product.

However, plaintiff also presented evidence in support of this claim that showed that the power of Rule derived from its multiproduct line. Thus, plaintiff argued to the jury that Rule funded the predatory pricing through the prices it charged on its other products. This theory is plausible because Rule was the dominant anchor distributor to the country.

For the foregoing reasons, the court concludes that ample evidence was presented to the jury from which they could find that Rule possessed the power to engage in predatory pricing.

Next, Rule argues that the structure of the anchor market *per se* precludes a monopoly. The court finds that the question of whether a monopoly could be created in the anchor market was a question of fact for the jury to consider. The jury could have reasonably concluded from the evidence presented at trial that a monopoly could be formed in the anchor market. Thus, the court rejects this argument as a basis for granting a JNOV.

Fifth, Rule argues that plaintiff's success confirms that there is no dangerous likelihood of monopolization. The court finds this to be a restatement of Rule's first argument. Accordingly, for the same reasons, the court rejects this argument as a basis for supporting a JNOV.

2. *Market Share/Relevant Market*

Rule's next argument in support of its motion for JNOV states that plaintiff failed to establish its market share in the relevant market. Plaintiff's witnesses testified that the effective area of competition was the continental United States. The evidence showed that 99% of Rule's products were sold in the continental United States. The court finds that ample evidence exists for the jury to define the relevant market and to determine defendant's market share therein. Therefore, the court must deny Rule's motion for a JNOV on this ground.

3. *Measure of Cost*

Rule contends that it is entitled to a JNOV based on the fact that plaintiff allegedly failed to present evidence below the legally appropriate measure of cost. Determination of the measure of cost is a (sic) issue for the court to determine. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1111 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The purpose of determining cost is to determine whether the party possessed intent to engage in predatory pricing. *McGahee*, 858 F.2d at 1503.

Defendant argues that Dr. Andrews' study into Rule's measure of costs employed the incorrect standard. Specifically, the Andrews study concerned fully distributed costs, where Rule argues that the appropriate measure of cost is the long range incremental cost standard.

The court must reject this argument. There was sufficient evidence regarding the fact that Rule's costs fell below average variable cost for the jury to conclude that defendant possessed the requisite predatory intent. Accordingly, the issue of whether long run marginal cost or

fully distributed cost is the appropriate standard is irrelevant as these costing measures both relate to average total cost. Average total cost is by definition greater than average variable cost.

Furthermore, the Eleventh Circuit did not reject outright the use of fully distributed cost, although it suggested that long range incremental cost would be the appropriate measure in most instances. *Id.* at 1503. The Eleventh Circuit further states that if the prices fall below short run marginal cost, or average variable cost, then there is a rebuttable presumption of predatory intent. Such being the evidence in this case, the jury was entitled to consider that a rebuttable presumption of predatory intent was established. Accordingly the court must reject defendant's argument in this instance.

4. *Meeting Competition*

Rule argues that it is entitled to a JNOV because even if the jury could reasonably conclude that Rule engaged in below cost pricing, that the pricing was set only to meet low price competition. The defense of meeting the competition is an affirmative defense for which Rule had the burden. *McGahee*, 858 F.2d at 1493 n.8. Rule makes the bald assertion that this defense should be determined as a matter of law. However, the court finds that this issue presents a fact question that was appropriate for the jury's determination. Because there was sufficient evidence to support the jury's conclusion in this regard, the court declines to issue a JNOV on this basis.

5. *The Conspiracy*

Rule next argues that it is entitled to a JNOV on the conspiracy claims because, it asserts, the changing market

shares of the Rule/Tie Down competitor in comparison to Anchor fails as a matter of law to qualify as an "unreasonable restraint of trade," a necessary element to the conspiracy verdict.

Because the court finds that the attempted monopoly verdict is well supported, as discussed in this order, the court declines to address the specific arguments Rule makes as to the validity of the conspiracy verdicts. However, in reviewing those claims, the court remains unpersuaded that a JNOV on any of Rule's arguments with respect to the conspiracy is appropriate, even if the attempt verdict were invalid.

6. *The Settlement Agreement*

Rule argues that the 1986 Settlement Agreement, signed between it and Anchor with regard to the then pending trademark infringement action, releases all claims of the plaintiff in this antitrust litigation that occurred prior to March 19, 1986.

The Settlement Agreement has been reviewed by the court. The court concludes that the language of the agreement is not ambiguous. Thus, the interpretation of the contractual provision at issue is a question of law for the court to determine. *Henderson Mill, Ltd. v. McConnell*, 237 Ga. 807, 809, 229 S.E.2d 660, 661 (1976). After careful consideration of the whole agreement, the court finds that the parties intended to terminate all claims arising out of the prior trademark infringement litigation. Parties to a release are not presumed to contract away rights with regard to a subject that does not clearly appear from the body of the agreement. *Covington v. Brewer*, 101 Ga. App. 724, 729, 115 S.E.2d 368 (1960). Thus, the court finds that the agreement did not cover these antitrust claims.

However, even if the court found that the agreement were ambiguous, the evidence was such that the jury could have reasonably concluded that the parties only intended to release liability for acts which occurred prior to the trademark infringement litigation.

For the foregoing reasons, the court DENIES defendant Rule's motion for a JNOV.

B. *Tie Down*

Tie Down files a motion for JNOV on plaintiff's claims against it for conspiracy to restrain trade and conspiracy to monopolize in violation of sections 1 and 2 of the Sherman Act. First, Tie Down argues that the plaintiff failed to meet its burden of proof with respect to the conspiracy claims.

Defendant Tie Down argues that an inference of conspiracy cannot be taken from "conduct as consistent with permissible competition as with illegal conspiracy," standing alone. Next defendant Tie Down argues that "an inference of antitrust conspiracy cannot stand in the face of direct, uncontradicted and reasonable testimony that the conspiracy did not exist." Third, defendant Tie Down argues that "there can be no inference of a predatory pricing conspiracy where the alleged conspiracy is implausible." Tie Down is not entitled to a JNOV on these points. Tie Down fails to relate the specific facts of its situation to the arguments which it presents to the court. The court finds sufficient evidence in support of the jury's verdict with respect to the conspiracy.

Next, Tie Down argues that the evidence does not support a "conscious commitment to a common scheme designed to achieve an unlawful objective through a course

of predatory pricing." The court finds that there is sufficient evidence to support a finding of conspiracy and agreement to form the conspiracy. Thus, the court must deny Tie Down's motion on this basis.

Tie Down argues that any inference of antitrust intent is negated by the fact that it sold its product above average total cost. In light of the fact that Tie Down was charged with engaging in a conspiracy, the conclusion fails to necessarily flow from the premise. Thus, the conclusion is not proven.

Nor is the court convinced that Tie Down's capacity was so limited as to negate any inference in a conspiracy.

Next, Tie Down argues that its price concessions were legitimate business practices which cannot support the inference of an antitrust conspiracy. The court agrees with the general legal principles cited by the defendant. In fact, the court instructed the jury the same, stating that "the fact that a supplier varies its prices in an effort to allow a customer to respond to price competition is not, by itself, unlawful. Furthermore, a supplier who grants discounts to a customer has a legitimate interest in making sure the customer receiving the discount is passing it on in the marketplace and not pocketing the price support."

However, there exists other evidence from which the jury may have found a conspiracy. Thus, the jury could have reasonably concluded that Tie Down conspired with Rule. Plaintiff's exhibit 683 presented evidence from which a jury could have inferred an antitrust conspiracy. The court finds that an inference of a conspiracy was plausible.

Next, Tie Down argues that the plaintiff failed to prove damages. Specifically, defendant argues that plaintiff

calculated damages based on plaintiff's total sales from the time of its inception until trial, despite the fact that plaintiff testified that sales to its customers based in Florida were in response to another company's anchors. Thus, Tie Down asserts that the damage award was overstated. The court discusses this point in detail in this order with regard to the defendants' motion for new trial. *See infra*. Based on the same reasoning, the court finds that defendant Tie Down is not entitled to a JNOV on this ground.

For the foregoing reasons, defendant Tie Down's motion for a JNOV is DENIED.

VI. MOTIONS FOR NEW TRIAL

A. *Tie Down*

Tie Down moves the court for a new trial, as an alternative to its motion for a JNOV. Tie Down moves for the new trial on three grounds. First, Tie Down asserts that the verdict is contrary to law, as discussed in their motion for judgment notwithstanding the verdict. As explained in this order, the court finds that the verdict is supported by law. Next, Tie Down argues that a new trial is required as the verdict is against the weight of the evidence. Finally, Tie Down contends that the damages are speculative and excessive.

B. *Rule*

Rule moves the court for a new trial on four grounds. First, Rule argues that damages are excessive. Second, Rule contends that the damage award was speculative. These arguments duplicate Tie Down's arguments with regard to damages. Third, Rule asserts that the verdict is the result of

sympathy and prejudice created by plaintiff's counsel's improper trial conduct. Finally, Rule argues that the verdict is against the weight of the evidence. This also reiterates a Tie Down ground for new trial.

Because several of the grounds asserted by defendants overlap, the court will consider the motions for new trial as one.

C. *The Standards*

A court may grant a motion for a new trial under Fed. R. Civ. P. 59(a) when the trial was unfair, or the verdict is against the great weight of the evidence. *Ard v. Southeast Forest Indus.*, 849 F.2d 517 (11th Cir. 1988); *Allstate Ins. Co. v. James*, 845 F.2d 315 (11th Cir. 1988). In considering a motion for new trial, the court must view the evidence in the light most favorable to the verdict. *Evans v. H.C. Watkins Memorial Hosp.*, 778 F.2d 1021, 1022 (5th Cir. 1985). In granting a motion for new trial based on the weight of the evidence, the verdict must be against the great weight of the evidence, not just the greater weight of the evidence. *Fondren v. Allstate Ins. Co.*, 790 F.2d 1533, 1535 (11th Cir. 1986). Nor may the court substitute its own credibility choices for the credibility choices of the jury in making the determination. *Id.*

As to allegations that the trial was unfair due to misconduct of counsel, the new trial would be appropriate if the remarks of counsel "impair[ed] gravely the calm and dispassionate consideration of the case by the jury." *James*, 845 F.2d at 319. The district court is given wide discretion "to control the tone of counsel's arguments and, absent an abuse of discretion, the decision of the trial court, which has had the opportunity to hear the offensive remarks within the

context of the argument and to view their effect on the jury, should not be disturbed." *Id.* at 318.

D. DISCUSSION

1. *Trial Conduct*

First, defendants argue that plaintiff's counsel mislead (sic) the jury from the start during his opening statement. Specifically, they argue that Mr. Porter deliberately attempted to mislead the jury and elicit their sympathy for his client by stating that Rule deliberately withheld documents from plaintiff, and produced them only by accident. The court, in response to defendants' objection to the comment, instructed the jury that the matter of document production was a discovery matter which would be handled by the court and was unrelated to any determination they were to make. Accordingly, the court instructed the jury to disregard the comment.

The court finds that the comment was not so egregious to have infected the trial, and that the instruction to the jury cured any prejudice that may have been a result of the comment. As such, the court finds this to be insufficient grounds to have prejudiced the jury and thus finds it is insufficient grounds to warrant a new trial.

Next, defendants argue that Mr. Chapmans comment that he reviewed certain documents only after a protective order was lifted was an attempt to gain the sympathy of the jury. Defendants claim that the theme was repeated in Mr. Porter's closing argument when he argued that Rule failed to produce its own costing study which was performed. Finally, defendants contend Mr. Porter's closing statement, where he contended that Rule would gain 94.8% of the

anchor business if Anchor went out of business in the next two weeks, was prejudicial.

The court reviewed these statements both individually and as a group. The court does not find that the effect of these comments over a seven week period, taking into consideration any curative instructions, elicited prejudice or sympathy from the jury. Accordingly, the court denies defendants' motions for new trial on this ground.

2. *Weight of the Evidence*

As formerly discussed in the defendants' motions for judgment notwithstanding the verdict, the court finds that the jury verdict was supported by the weight of the evidence. Accordingly, the court declines to further address this point.

3. *Damages*

Defendants argue five bases to show that the damage award is not supported by the weight of the evidence. First, they claim that the Andrews' damage study includes damages that were not caused by Rule. Second, they argue that the Andrews' damage study was grounded on an incorrect baseline figure. Third, they argue that the Andrews' damage study is flawed in that it is based upon erroneous assumptions. Fourth, they argue that the damage study is erroneous in that is (sic) utilizes an improper method of calculating damages. Fifth, they assert that the damage award is insupportable as partially based on projections. The court will address each of these arguments.

The court first examines the assertion by defendants that the study includes damages that were not caused by Rule. Some evidence was introduced at trial to show that Anchor lowered some of its anchor prices in the Southeast

in order to compete with KGS imported anchors. The Southeast constitutes the largest marine anchor market. Other evidence showed that Rule set the market prices.

Once causation of damages is proven, the amount of damages must be determined by the jury. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983). However, strict proof as to what damages have resulted is not essential. *Id.* Damages must, however, only contain loss estimates that are "directly attributable to unlawful competition." (emphasis deleted). *Id.* The more lenient standard for calculating damages is only available once "proof of defendant's wrongful acts and their tending to injure plaintiffs' business, . . .evidence in the decline of prices, profits and values, not shown to be attributable to other causes" is shown. *Id.*, (*quoting Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1981)). Where damage calculations are based in part on lawful competition by the defendant, without some guidance in the record, consideration of those figures by the jury would amount to speculation. *Id.* at 1162, (*citing Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975)).

This court has some reservations about damages. However, the court finds that the proper law of damages was applied and that the facts support the jury's verdict in this regard.

The court finds that the jury heard and considered the evidence that anchor prices were reduced for a short time in reaction to lawful competition by the other competitor. The jury was carefully informed as to how damages were calculated. The jury properly considered the issue. The jury's verdict is supported by the evidence regarding this

issue. Thus, the court finds that the damage award is not erred in this respect.

The second ground that Rule and Tie Down advance in support of a new trial is that the Andrews' damage study started with an incorrect baseline for calculating damages. Specifically, Rule argues that Anchor voluntarily reduced its prices in 1985, which resulted in an entire damage study premised upon prices that were not the result of anticompetitive actions. The court finds that evidence in the record supports the contention that the 1985 price reductions were not voluntary. If the price reductions were not voluntary there is little merit to defendants' argument. Because the record supports plaintiff's position, the court rejects this argument.

Third, defendants assert that the damage calculation is in error in that it is based on false assumptions. Anchor contends that the Andrews' study assumes that Anchor would have sold the exact same number of anchors at the higher prices; that foreign and other domestic sellers of anchors would have not effected the market; that Rule and Tie Down would never lower their prices; and that Anchor's cost would have remained constant regardless of the amount of sales.

Proof of damages may be based on assumptions, so long as the assumptions rest upon sufficient data. *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1539 (11th Cir. 1985). Here the court finds that the assumptions employed by plaintiff's expert were sufficiently supported by the evidence.

The evidence adduced at trial showed that the demand for anchors remained relatively constant regardless of price. This evidence supports the assumption that Anchor's sales may have remained constant despite an increase in price.

The evidence further supports the conclusion that the other foreign and domestic players in the anchor market were negligible and would have had little if any effect on the market. Thus, the assumption that the foreign or domestic competitors would not have effected the market is not erroneous, based on the evidence adduced at trial. Finally, the court sees little merit in the arguments that the assumptions that Rule and Tie Down would never lower their prices and that Anchor's costs would have remained constant regardless of the amount of sales produced a flawed study. Thus, the court declines to further discuss these points.

Next, in support of the motion for new trial with respect to damages, defendants argue that the lost revenue approach to calculating damages is erroneous. Defendants argue that the lost revenue figure employed by plaintiff failed to take into account expenses required to generate that additional revenue. However, plaintiff's expert testified that damages were calculated on the basis of lost revenues on actual sales. This being the case, plaintiff's damages took into account expenses. Thus, the court rejects the argument that the damage theory employed by plaintiff was erroneous.

Finally, defendants argue that the damage figure is insupportable in that it includes damages for 1989-90 and 1990-91 when no cost analysis of Rule was performed. Andrews testified that he considered Rule's cost through 1990. Thus, there is no merit to the argument that damages estimates for the 1989-90 were not based on an actual cost analysis. The 1990-91 season estimates were not based on actual figures as Rule had not yet released its financial information for that period. Thus, this figure was based upon a projection derived from the past performance.

The court allows estimations in other contexts with regard to calculating damages under the antitrust laws. The court has approved use of the "yardstick theory" for estimating profits. *G.M. Brod*, 759 F.2d at 1539. This theory allows the plaintiff to estimate lost profits based on the profits of a business that is closely comparable to plaintiff's. *Id.* Although somewhat different, the court finds this theory to provide some support by analogy.

The court finds that the projections of defendant Rule's costs versus revenues for the 1990-91 season are permissible. The projection is based on a five year pattern of *that* business. Furthermore, since no other information was available at the time of trial, the only method of calculating damages for this time period would be through the use of a projected figure. As many courts have stated, failure of a plaintiff to show the exact amount of damages is not enough to relieve the defendant of liability. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 858 (5th Cir. Unit B 1981). "To hold otherwise 'would enable [the defendant] to profit by [its] wrongdoing at the expense of [its] victim.'" *Id.* (*quoting Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 580-81 (5th Cir. 1980) (*quoting Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946))). To overturn a damages award merely because part of it was based on a projection, when projections are commonly utilized in calculation of damages and where the actual figures were not available, would likewise permit the defendant to profit by its wrongs. Finally, it should be noted that Rule does not argue that the projected figure employed by Dr. Andrews was in fact incorrect. Thus, the court concludes that the jury verdict was amply supported by the evidence.

For the foregoing reasons, the court thus DENIES defendants' motion for a new trial based on damages.

VII. MOTION TO STAY EXECUTION OF JUDGMENT WITHOUT BOND/ MOTION TO REGISTER JUDGMENT IN OTHER DISTRICTS/ MOTION TO COMPEL POSTING OF SUPERSEDEAS BOND

The court conducted a hearing on August 29, 1991, in which the issues of the motion for stay of execution of judgment and posting of a supersedeas bond were briefly raised. The court permitted the parties additional time in which to submit additional information on these issues. Defendants were given fourteen days in which to submit a brief and any supporting affidavits; plaintiff was given seven days from the date of filing of defendants' briefs in which to respond. Thus, the additional information is due on September 20, 1991. The Clerk is DIRECTED TO RESUBMIT this matter to the court's attention at that time.

For that reason, the court DEFERS ruling on the motion to stay execution of judgment pending appeal, the motion to compel defendants to post a supersedeas bond, and the motion to register judgments in other districts pending the court's consideration of the parties supplemental information.

VIII. CONCLUSION

For the foregoing reasons, plaintiff's motion for permanent injunction is DENIED; defendant Rule's motion to file supplemental brief in opposition to plaintiff's motion for entry of permanent injunction is DENIED AS MOOT; defendant Rule's motion to stay execution of judgment without bond, or in the alternative for reduced bond; is DEFERRED; defendant Tie Down's motion to stay

execution of judgment without bond, or in the alternative for reduced bond is DEFERRED; defendant Rule's motion for judgment notwithstanding the verdict is DENIED; defendant Rule's motion for a new trial is DENIED; defendant Tie Down's motion for judgment notwithstanding the verdict is DENIED; defendant Tie Down's alternative motion for new trial is DENIED; Tie Down's counsel's motion for withdrawal is DENIED; plaintiff's motion to register judgment in other districts is DEFERRED; plaintiff's motion to compel defendants to post a supersedeas bond is DEFERRED; defendant Rule's motion for attorney's fees regarding the deposition of Dr. Mueller is DEFERRED; and plaintiff's motion to hold Rule in civil contempt is MOOT.

SO ORDERED, this 30th day of August, 1991.

JACK T. CAMP
UNITED STATES DISTRICT JUDGE

Jan 07, 1994
Miguel J. Cortez

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8854

U.S. ANCHOR MFG, INC.,

Plaintiff,Counterclaim Defendant, Appellee, Cross-Appellant,

versus

RULE INDUSTRIES, INC.,
Defendant-Appellant, Cross-Appellee,

TIE DOWN, INC., a/k/a Tie Down Engineering, Inc.,
Defendant, Counterclaim Plaintiff, Appellant, Cross-Appellee,

WILLIAM CHAPMAN,
Counterclaim Defendant.

On Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING

BEFORE: COX and DUBINA, Circuit Judges and GODBOLD, Senior Circuit Judge

PER CURIAM:

The Petition for rehearing filed by the Appellee/Cross-Appellant, U.S. Anchor Mfg. Inc., is denied.

/s/Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

SALES AND MARKET SHARES OF SUPPLIERS OF
COMPETING LIGHT WEIGHT FLUKE STYLE PENETRATING ANCHORS

(Sales in Dollars)

Company	1984-85	Per-cent	1985-86	Per-cent	1986-87	Per-cent	1987-88	Per-cent	1988-89	Per-cent	1989-90	Per-cent
Bule Danforth 1/	$1,154,094	40.5%	$912,550	38.0%	$930,317	34.6%	$894,618	31.6%	$838,822	29.6%	$583,218	27.5%
Bule Booker	-	-	526,324	21.9	596,638	22.2	618,562	21.9	611,231	21.6	464,784	21.9
Total Bule	$1,154,094	40.5	1,438,874	60.0	1,526,955	56.7	1,513,180	53.5	1,450,053	51.2	1,048,002	49.4
Tie Down 2/	1,426,981	50.0	-	-	-	-	-	-	-	-	-	-
U S. Anchor	-	-	580,881	24.6	796,919	29.6	966,028	34.2	1,008,961	38.4	962,767	45.4
RGS Imports 3/	85,301	3.0	82,964	3.5	70,878	2.6	20,436	.7	25,183	.9	-	-
Nesset Imports 4/	13,890	0.5	-	-	9,821	.4	39,436	1.4	-	-	-	-
Attwood Imports 5/	-	-	127,272	5.3	75,480	2.8	81,168	2.9	70,776	2.5	-	-
L S. Brown 6/	36,285	1.3	72,298	3.0	70,386	2.6	70,000	2.5	40,000	1.4	-	-
Davis 7/	133,178	4.7	87,302	3.6	109,516	4.1	114,508	4.1	137,334	4.8	108,755	5.1
Queen Bee 8/	-	-	1,000	.0	13,500	.5	20,000	.7	20,000	.7	-	-
Sumna 9/	-	-	-		18,321	.7	-	-	-	-	-	-
Tru Trac 10/	-	-	-		-	-	-	-	-	-	-	-
Total All Other 11/	268,654	9.5	370,836	15.5	367,902	13.7	349,548	12.4	293,293	10.4	108,755	5.1
Total	$2,847,729	100.0%	$2,398,591	100.0%	$2,691,776	100.0%	$2,828,756	100.0%	$2,832,307	100.0%	$2,119,524	100.0%

BEST AVAILABLE

Anchor	Current TDE Cost	% Change	Proposed TDE Selling Price Prior to Rule*	Proposed Rule Selling Price*	Anticipated Anchor Selling Price*	Potential Anchor Volume*	Manufacturing Cost Per Model	Gross Revenue Per Machine
0	$ 1.83	7.1%	$ 2.40	$ 2.45 (2.65)	$ 2.38	11,500	$ 21,045	$ 27.
00	2.66	3.5%	3.39	3.46 (3.74)	3.37	21,000	51,660	70
10	3.47	4.3%	4.53	4.61 (5.00)	4.50	21,000	71,400	94
20	4.68	5.4%	6.33	6.44 (6.98)	6.28	5,800	27,144	36
30	5.05	7.1%	7.07	7.20 (7.80)	7.02	4,900	24,745	34
30	1.76	5%	2.38	2.22 (2.40)	2.16	2,700	4,752	5
40	2.74		3.66	3.55 (3.84)	3.45	7,800	21,372	26
80	4.23		5.24	6.90	6.21	14,000	59,220	86
40	6.76		9.14	11.17	10.05	7,200	48,672	72
250	8.91		11.32	15.72 (17.03)	15.33	1,650	14,041	25
300	11.57		15.14	17.91 (19.40)	17.46	2,000	23,240	34
600	19.13		25.87	30.91 (33.49)	30.14	300	4,739	7
							$372,933	$526

Estimated Annual Gross Margin $151,902.00

ESTIMATED OPERATING EXPENSES

Salaries	70,000.00
Insurance & taxes	9,000.00
Sales commissions	16,000.00
Professional fees	6,000.00
Office expense	10,000.00
Selling expense	6,000.00
Rent expense	22,000.00
Telephone	3,000.00
Utilities	10,000.00
Maintenance	7,500.00
Shipping expense (freight, packaging)	36,000.00
Leased equipment	6,000.00
Interest	16,500.00
TOTAL OPERATING EXPENSES	$215,000.00

NET PROFIT BEFORE DEPRECIATION ($-63,098.00)

ANTICIPATED CASH POSITION AFTER SIX MONTHS

Initial Capitalization		$200,000.00
Bank Credit Availability:		
35% inventory collateral		10,500.00
85% receivables		49,300.00
Start-up costs:		
Dies	$35,000.00	
Leasehold improvements	10,000.00	
Machinery not financed	20,000.00	
Deposits	4,500.00	
Expenses incurred prior to start-up	20,000.00	
Six months operating losses	31,000.00	
Accounts payable	37,000.00	
Inventory (paid for)	31,000.00	
Accounts receivable (45 days)	58,000.00	
CASH POSITION JUNE 1, 1986		$213,000.00
CASH POSITION DECEMBER 1, 1986		$-18,246.00

PLAINTIFF'S EXHIBIT 43

DEFENDANT'S EXHIBIT 625

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NOTE: The above assumes . the selling price will be roximately 10% below Rule s. A 15% price advantage would increase the estimat. osses by $26,24[illegible] ($69,333.[illegible] year). Anticipated negative cash positi[illegible] would be at approximately $44,000 by December 1 of next year.

t a gross margin of approximately 30% (after reducing prices to 10% below proposed price levels), my original argument of helping revenues below $600,000 for one year's revenue becomes obvious. Estimated cash position would be $4,500.00 after six months and decrease to $-36,000.00 after one year, assuming a 10% price differential, and $-63,000.00, assuming a 15% price differential.

Operating losses for one year are estimated as per the following:

RECAP

Revenues	Price Differential	Net Loss (before depreciation)
$525,000	10%	($63,000)
525,000	15%	(99,000)
400,000	10%	(81,500)
400,000	15%	(101,500)

COMMENT: I believe if Rule offers May dating on Hooker anchors the 15% price differential will be the competition's price in the U.S. market. The only other tie-in that may help at this time would be for Rule to also allow dating on the Danforth Standard Line in conjunction with substantial Hooker orders. Example: Order 30% of last year's Hooker anchor purchases (by units, not dollars) and Rule will allow May dating on all Hooker and Danforth anchors shipped in December and January. Less than 30% disqualifies Danforth purchases from May dating.

- Proposed "e Down Selling Price to Rule

These prices are based on a 17½% discount off of our prices prior to the October 7½% discount.

- Proposed Rule Selling Price

The prices in parentheses are based on a 35% discount off of Rule's Best Buy prices. The 8 pound (model M-480) and 13 pound (model M-740) Super Hookers are priced at 40% off of Rule's Best Buy prices. Prices in the left hand column are all based at 40% off Best Buy pricing.

- Anticipated Competitive Anchor Selling Prices

Those prices are based on a 10% price differential below Rule's proposed selling price

- Potential Anchor Volume

I have based the sales volume by anchor models assuming that Rule retains only 25% of the 1974 Hooker anchor sales.

BEST AVAILAB

Own Engineering, inc.

February 12, 1986

Mr. Don Read
Rule Industries, Inc.
Cape Ann Industrial Park
Gloucester, Massachusetts 01930

Re: Hooker Pricing for 1987

Dear Don:

In following up to our conversation during my recent visit to Rule Industries, I believe that any early pricing indications from Rule, prior to the Chicago Show, would have tremendous impact on the Rule/Hooker program for 1987. An announced price decrease of approximately 10% on the Hooker line around September 1, 1986 should have a significant effect on the future viability of the Rule/Tie Down anchor program. The resulting confusion created by such a program could very favorably influence the sales of Danforth anchors.

Of course, in the event that Rule should choose such a course of action, Tie Down will participate by reducing the cost of the Hooker anchors to Rule as we have during previous special pricing considerations.

In the event that I can be of further assistance, please do not hesitate to contact me at your convenience.

Very truly yours,

C. J. Mackarvich
President

CJM/kky

PLAINTIFF'S EXHIBIT 6-18-89

PLAINTIFF'S EXHIBIT 68

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scenarios of the market share chronology were presented to the jury:

Excluding Danforth Standard, Measuring In Units

Season	U.S. Anchor's Share	Rule's Share
1985/86	37.6%	30.1%
1986/87	45.4%	30.4%
1987/88	49.6%	28.9%
1988/89	55.9%	28.0%
1989/90	60.1%	24.1%

Including Danforth Standard, Measuring In Units

Season	U.S. Anchor's Share	Rule's Share
1985/86	30.6%	43.1%
1986/87	38.7%	40.7%
1987/88	43.2%	38.1%
1988/89	49.2%	36.7%
1989/90	54.2%	32.0%

Excluding Danforth Standard, Measuring In Dollars

Season	U.S. Anchor's Share	Rule's Share
1985/86	39.6%	35.4%
1986/87	45.2%	33.9%
1987/88	49.9%	31.9%
1988/89	54.6%	30.7%
1989/90	62.7%	30.2%

Including Danforth Standard, Measuring In Dollars

Season	U.S. Anchor's Share	Rule's Share
1985/86	24.6%	60.0%
1986/87	29.6%	56.7%
1987/88	34.2%	53.5%
1988/89	38.4%	51.2%
1989/90	45.4%	49.4%

USTX 467; RTXs 674, 675.

BEST AVAILA

I. USTX 683
COST PRICE COMPARISON SUMMARY

Model	683 Proposed TDE Price To Rule	Handling[1]/ Charge	Label[1]/ Cost	TDE Total Charge To Rule	683 Proposed Rule Selling Price
E-80	$ 2.40	$ .282	$ .11	$ 2.79	$ 2.45
E-100	3.39	.343	.11	3.84	3.46
E-110	4.53	.385	.11	5.03	4.61
E-120	6.33	.490	.11	6.93	6.44
E-130	7.07	.575	.11	7.76	7.20
M-130	2.38	.201	.11	2.69	2.22
M-240	3.66	.260	.11	4.03	3.55
M-480	5.54	.524	.11	6.17	6.90
M-740	9.14	.822	.11	10.07	11.17
M-1050	11.32	1.101	.11	12.53	15.72
M-1300	15.14	1.629	.11	16.88	17.91
M-1600	25.87	2.846	.11	28.83	30.91

II. RULE'S AGGREGATE LOSSES
BASED ON ITS USTX 683 ANTICIPATED SALES (25%)

Model	TDE Total Charge To Rule	Antic. Anchor Volume	Total Costs	683 Proposed Rule Selling Price	Total Revenues
E-80	$ 2.79	3,833	$ 10,694	$ 2.45	$ 9,390
E-100	3.84	7,000	26,880	3.46	24,220
E-110	5.03	7,000	35,210	4.61	32,270
E-120	6.93	1,933	13,395	6.44	12,449
E-130	7.76	1,633	12,672	7.20	11,758
M-130	2.69	900	2,421	2.22	1,998
M-240	4.03	2,600	10,478	3.55	9,230
M-480	6.17	4,666	28,789	6.90	32,195
M-740	10.07	2,400	24,168	11.17	26,808
M-1050	12.53	550	6,892	15.72	8,646
M-1300	16.88	666	11,242	17.91	11,928
M-1600	28.83	100	2,833	30.91	3,091
			$185,474		$181,983

1/ See USTX 547 p. 17 (Rev. 2) DC-17. The information sources were Rule's expert witness Addington and Tie Down's expert witness Finn.

3601P

EXHIBIT "A"

BLE COPY

Supreme Court, U.S.
FILED
MAY 26 1994
OFFICE OF THE CLERK

No. 93-1766

In The

Supreme Court of the United States

October Term, 1993

U.S. ANCHOR MFG., INC.,

Petitioner,

v.

RULE INDUSTRIES, INC. and TIE DOWN, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF TIE DOWN INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAURIE WEBB DANIEL
Counsel of Record
HAROLD T. DANIEL, JR.
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Attorneys for Respondent Tie Down, Inc.

May 27, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent Tie Down, Inc. (hereinafter "Tie Down")* respectfully submits that the questions presented should be restated as follows:

1. Did the Eleventh Circuit err in finding that there was insufficient evidence to support an attempt to monopolize claim for alleged predatory pricing in this case?

2. Did the Eleventh Circuit err in finding that there was insufficient evidence to support an antitrust conspiracy claim in this case?

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* Respondent Tie Down Inc., a/k/a Tie Down Engineering Inc., has no parent companies or subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING THE PETITION 1

I. PETITIONER'S DESCRIPTION OF THE QUESTIONS PRESENTED AND STATEMENT OF THE CASE MISCHARACTERIZE THE RECORD AND THE HOLDING BELOW 1

II. PETITIONER GIVES THE COURT NO REASON TO CONSIDER THE ATTEMPT TO MONOPOLIZE CLAIM 2

A. Petitioner Mischaracterizes The Eleventh Circuit's Holding On The Attempt To Monopolize Claim 2

B. Even If The Eleventh Circuit's Opinion Could Be Read As Being Inconsistent With Its Prior Decisions Rejecting A Bright-Line Market Percentage Test, Under *Wisniewski v. United States* The Circuit Court Should Be Given The Opportunity To Resolve This Supposed Internal Conflict 4

C. The Eleventh Circuit's Decision On The Attempt To Monopolize Claim Is Consistent With Governing Authority 5

D. The Eleventh Circuit Correctly Held That The Particular Evidence In This Case Is Insufficient To Support The Attempt To Monopolize Claim 7

III. PETITIONER GIVES THE COURT NO REASON TO CONSIDER THE CONSPIRACY CLAIM ... 9

TABLE OF CONTENTS – Continued

Page

A. Petitioner Failed To Argue At Trial Or In Its Appellate Brief That This Is A Price-Fixing Case Involving Per Se Rules Of Antitrust Law 9

B. The Eleventh Circuit's Decision On The Conspiracy Claim Is Consistent With Governing Authority 12

C. The Eleventh Circuit Correctly Held That The Particular Evidence In This Case Is Insufficient To Support The Conspiracy Claim 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 15

Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) 5

Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. ___, 113 S. Ct. 2578 (1993) 6

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 7

Carlson Mach. Tools, Inc. v. American Tool Inc., 678 F.2d 1253 (5th Cir. 1982) 14, 15

Chisholm Bros. Farm Equip. Co. v. International Harv. Co., 498 F.2d 1137 (9th Cir. 1974) 14

Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969) 4, 5

The Jeanery Inc. v. James Jeans Inc., 849 F.2d 1148 (9th Cir. 1988) 15

Lewis Service Center Inc. v. Mack Trucks Inc., 714 F.2d 842 (8th Cir. 1983) 14

Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574 (1986) 6, 7, 13

McGahee v. Northern Propane Gas Co., 858 F.2d 1487 (11th Cir. 1988) 4, 5

TABLE OF AUTHORITIES – Continued

Page

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 13, 14, 15

Posters 'n' Things, Ltd. v. United States, No. 92-903 (U.S. May 23, 1994) 12

Singleton v. Wulff, 428 U.S. 106 (1976) 12

Sulmeyer v. Coca-Cola Co., 515 F.2d 835 (5th Cir. 1975) 4

United States v. Colgate & Co., 250 U.S. 300 (1919) 14

United States v. Columbia Steel Co., 334 U.S. 495 (1948) 1, 4

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 14

Wisniewski v. United States, 353 U.S. 901 (1957) 4, 5

REASONS FOR DENYING THE PETITION

The Eleventh Circuit's opinion below is correct and does not conflict with any opinion from this Court or from any court of appeals. This case involves nothing more than the fact-bound application of settled law to the particular facts of this case. Accordingly, review of this case is not warranted.

I. PETITIONER'S DESCRIPTION OF THE QUESTIONS PRESENTED AND THE STATEMENT OF THE CASE MISCHARACTERIZE THE RECORD AND THE HOLDING BELOW.

The petition in this case contains several misstatements of fact and law, including a distortion of the holding of the court below. Petitioner states that the Eleventh Circuit imposed on all attempted monopolization claims "a bright-line requirement that the defendant possess at least 50% of the relevant market at the beginning of its predatory conduct." (Pet. 11). In reality, however, the court of appeals rejected a bright-line approach and, citing *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), cautioned that "the relative effect of percentage command of the market varies with the setting in which that factor is placed." (Pet. App. 31a). The court of appeals also specifically noted that the relevant time for measuring market share was not just at the beginning of the alleged predatory conduct but "throughout the time when it was alleged to have continued." (Pet. App. 34a).

Petitioner asserts that the decision of the court of appeals represents a substantial departure from existing

law on "the *per se* illegality of vertical price fixing agreements." (Pet. 10). Petitioner failed to argue in its appellate brief that this is a price-fixing case or that *per se* rules of antitrust law should apply. Accordingly, the decision of the court of appeals did not even address the requisites for establishing liability for a "price-fixing agreement." (Pet. App. 35a-38a).

Petitioner contends that the underlying evidence supports the jury verdict. The Eleventh Circuit, after a vigorous and detailed review of the entire record, found otherwise. The actual record reveals that there was no dangerous probability that the alleged predatory pricing scheme could succeed and that Tie Down did not knowingly participate in a below-cost pricing scheme. As recognized by the court of appeals, Petitioner's admissions at trial establish that Rule could never maintain a monopoly or supra-competitive prices even if U.S. Anchor went out of business. (U.S.T.X. 12; R32-76; R36-186, 187). Furthermore, undisputed evidence established that Tie Down never "agreed" with Rule on any price level (R34-24; R40-141; R41-53), that Tie Down had no control whatsoever over Rule's prices (Pet. App. 13a; R33-187; R34-100; R46-33; R34-35), and that Tie Down had no knowledge that Rule ever engaged in below-cost pricing. (Pet. App. 37a; U.S.T.X. 517; U.S.T.X. 405; U.S.T.X. 395).

II. PETITIONER GIVES THE COURT NO REASON TO CONSIDER THE ATTEMPT TO MONOPOLIZE CLAIM.

A. Petitioner Mischaracterizes The Eleventh Circuit's Holding On The Attempt To Monopolize Claim.

The Eleventh Circuit did *not* hold that, as a matter of law, a defendant can never be liable for attempted

monopolization unless it has at least 50% of the relevant market at the inception of the alleged misconduct. Instead, the court ruled on the specific facts of this case that (1) U.S. Anchor had failed to present evidence of Rule's market share at the time the alleged attempt began (October 1985), and (2) the best evidence available indicated that U.S. Anchor had a greater and ever increasing share of the market throughout the entire relevant time period, while Rule's steadily declined. (Pet. App. 10a).

The only evidence in the record regarding market share when the alleged predation began was Rule's month-by-month comparison of Rule's and U.S. Anchor's sales. That evidence showed that in October 1985, and throughout the remainder of the 1985-86 anchor season, U.S. Anchor sold more anchors than Rule did and that for the entire 1985-86 season, Rule's market share was 30.1%. (Pet. App. 9a). The undisputed evidence also showed that Rule's market share steadily declined each season thereafter, reaching its low in the 1989-90 season at 24.3%. *See* Rule's Eleventh Circuit Brief at 9. Considering this evidence, the court ruled that U.S. Anchor had failed to show that Rule had a dangerous probability of monopolizing the generic fluke-style anchor market. (Pet. App. 33a-34a).

Although the court started with the undisputed premise that "something more than 50% market share would be required to show *actual* monopoly. . . . " (Pet. App. 32a, emphasis in original), it did not purport to establish a "bright line" 50% market share test for all attempted monopolization claims. The court specifically noted that " 'one must be particularly wary of the numbers game of market percentage when considering an

"attempt to monopolize" suit' under the dangerous probability standard." (Pet. App. 31a, *quoting Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969)). The Eleventh Circuit then employed the same case-by-case analysis as found in previous binding Eleventh and Fifth Circuit authority. *See, e.g., McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988); *Sulmeyer v. Coca-Cola Co.*, 515 F.2d 835, 849-51 (5th Cir. 1975); *Cliff Food*, 417 F.2d at 207 n.2. Indeed, the court of appeals cited *United States v. Columbia Steel*, 334 U.S. 495 (1948), for the proposition that "the relative effect of percentage command of the market varies with the setting in which that factor is placed." (Pet. App. 31a). The court's comment that Rule's market share remained below 50% simply pointed out that Rule was never able to achieve a dominant market position even after years of challenged conduct. Petitioner's entire argument is based on a misreading of the opinion below. Once the one sentence Petitioner contests is put in context, it is apparent that the Eleventh Circuit's opinion is correctly based on its analysis of the facts of this case.

B. Even If The Eleventh Circuit's Opinion Could Be Read As Being Inconsistent With Its Prior Decisions Rejecting A Bright-Line Market Percentage Test, Under *Wisniewski v. United States*, The Circuit Court Should Be Given The Opportunity To Resolve This Supposed Internal Conflict.

As discussed above, binding Eleventh Circuit precedent squarely rejects a bright-line market percentage test for evaluating dangerous probability of success. *See*

McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1505-06 (11th Cir. 1988) (the market share necessary for a showing of dangerous probability of success depends on a number of factors); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969) ("one must be particularly wary of the numbers game of market percentage when considering an 'attempt to monopolize' suit").[1] The existence of this clear precedent which, as mentioned above, was specifically discussed and applied by the Eleventh Circuit in its opinion below, strongly suggests that the bright-line reading urged by petitioners was not intended. Surely the court of appeals would not have so cavalierly overruled these prior cases without even mentioning that it was doing so.

Even if the Eleventh Circuit's opinion could be read as urged by petitioner, thereby creating a conflict with other binding precedent within the Circuit, prior decisions of this Court dictate that the court of appeals be given an opportunity in later cases to make its meaning clear and resolve any possible internal inconsistencies. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Accordingly, this Court should deny the petition for this independent reason.

C. The Eleventh Circuit's Decision On The Attempt To Monopolize Claim Is Consistent With Governing Authority.

Petitioner's suggestion that the Eleventh Circuit's decision "represents a substantial departure from existing

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[1] Decisions of the old Fifth Circuit prior to the creation of the Eleventh Circuit in 1981 are binding on the Eleventh Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981).

law" on the dangerous probability element of a Section 2 Sherman Act claim ignores the context of this case. This is a predatory pricing case which is governed by *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. ___, 113 S. Ct. 2578 (1993) and *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

Brooke Group explained the dangerous probability element in a predatory pricing case:

> The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

113 S. Ct. at 2588. Citing *Matsushita*, the Court observed in *Brooke Group* that "in order to recoup their losses, predators must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." *Id.* at 2589. Significantly, both *Brooke Group* and *Matsushita* held that summary disposition is appropriate where subsequent market data indicate that the defendant would not be able to recoup its lost profits. Indeed, both cases found that the failure of the alleged scheme after years of challenged pricing is evidence that successful recoupment could not occur. *Brooke Group*, 113 S.Ct. at 2593-2595; *Matsushita*, 475 U.S. at 591-593.

The decision of the Eleventh Circuit in this case, therefore, is completely consistent with governing Supreme Court authority. The Eleventh Circuit held that there was no dangerous probability of success because

Rule possessed less than 50% market share "at the time the alleged predation began *and throughout the time when it was alleged to have continued.*" (Pet. App. 34a, emphasis added). The Eleventh Circuit's conclusion that the dangerous probability element was negated by the evidence of Rule's failure to achieve a dominant market position after years of alleged below-cost pricing really just mirrors this Court's conclusion in *Matsushita*:

> Two decades after their conspiracy is alleged to have commenced, petitioners appear to be far from achieving this goal. . . . Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. [cit.]. Neither the District Court nor the Court of Appeals found, however, that petitioner's share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing – that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.

Matsushita, 475 U.S. at 591 (emphasis original). *See also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n. 15 (1986) (citing authorities for proposition that 60% market share is necessary for a successful predatory pricing campaign).

D. The Eleventh Circuit Correctly Held That The Particular Evidence in This Case Is Insufficient To Support The Attempt To Monopolize Claim.

Petitioner initially complains that the Eleventh Circuit erred with respect to the dangerous probability

element by redefining the relevant market to exclude the premium brand Danforth anchors. The market definition used by the Eleventh Circuit, however, was based on an extensive review of the facts and application of settled precedent. In fact, as argued by Tie Down in its appellate brief, Petitioner's admissions *in judicio* required the market definition used by the Eleventh Circuit. Petitioner's response to Rule's interrogatories limited the relevant product market to generic anchors. Petitioner's president, Mr. Chapman, admitted at trial that the anchors made by Petitioner were not involved in "price competition" with the Danforth anchors. Mr. Chapman also unequivocally identified the generic anchors as the competing products in correspondence. (*See* Brief of Appellant Tie Down Engineering, Inc., 7).

Regardless of the market definition used, however, additional admissions of Petitioner and other unrefuted evidence mandate the conclusion that there was never a dangerous probability that Rule could ever maintain a monopoly position in the market or the supracompetitive profits which are essential to the recoupment aspect of the alleged scheme even if Petitioner went out of business. For example, in Petitioner's business plan, Mr. Chapman wrote that the market was "wide open" and that "no supplier of a commodity product will maintain 80% market share for the customer not only desires a choice with whom to do business; many customers insist on handling this commodity from a different vendor." (U.S.T.X. 12). Mr. Chapman also admitted at trial in testimony and in documents that it simply would not be feasible to raise prices to supracompetitive levels even

with a majority share of the market. (R32-76). Other witnesses called by both sides confirmed the implausibility of maintaining high prices even with a majority market share because of the continued threat of competition from Korea and China. (*E.g.* R36-186, 187; R37-20; R44-176, 177; R38-9; R43-78, 79; T.D.T.X. 340, p. 15, 26).

Because this unrefuted evidence established that there was no dangerous probability that the alleged predatory pricing scheme could succeed in the recoupment phase even if Petitioner went out of business, the Eleventh Circuit correctly entered judgment in favor of Rule on the attempted monopolization claim.

III. PETITIONER GIVES THE COURT NO REASON TO CONSIDER THE CONSPIRACY CLAIM.

A. Petitioner Failed To Argue At Trial Or In Its Appellate Brief That This Is A Price-Fixing Case Involving Per Se Rules Of Antitrust Law.

Petitioner suggests that the Court should grant review in this case "to correct the Eleventh Circuit's manifestly incorrect analysis on the conspiracy verdict, which threatens to undermine the Court's long established rule that price-fixing agreements, whether horizontal or vertical, are *per se* illegal." (Pet. 10). Petitioner's position with respect to the conspiracy verdict is fundamentally flawed, however, because this is not, and never has been, a price-fixing case. Petitioner did not argue at trial or in its appellate brief in the Eleventh Circuit that liability should be based on a price-fixing agreement or

that the *per se* rules of antitrust law should apply. Moreover, undisputed evidence in the record establishes that there is no factual basis for a *per se* price-fixing theory.

Petitioner's legal instructions to the jury conclusively establish that Petitioner chose to try its conspiracy claim under a rule of reason analysis, not under a *per se* price-fixing theory. In "Joint Request To Charge No. 4", Petitioner specified that its Section 1 claim was "for conspiracy to eliminate a competitor," not for conspiracy "to fix prices". (*Infra* at App. 1). Furthermore, in the last paragraph of this request, Petitioner asked the trial court to instruct the jury using the rule of reason standard, not a *per se* standard:

> Finally, you may also consider Defendants' purpose in imposing the restraint. A purpose or intent to harm competition, by itself, is not sufficient to establish an unreasonable restraint of trade. However, consideration of the purpose of the restraint may help you in determining if it would likely have a harmful effect on competition. You may consider, for example, whether Defendants imposed the restraint to achieve a legitimate business purpose and, if so, whether the restraint was tailored to achieve that legitimate business purpose, or, rather, was broader than necessary.

(*Infra* at App. 3). This instruction, which Petitioner requested at trial, directly conflicts with Petitioner's new position that the Eleventh Circuit's "injection of intent" into the conspiracy claim constituted a "manifestly incorrect analysis."

The appellate brief filed by Petitioner in the Eleventh Circuit similarly restricted Petitioner's Section 1 claim to an alleged "conspiracy to eliminate a competitor" which is subject to a rule of reason analysis. Petitioner's appellate brief described the only issue relating to the federal conspiracy claim as follows:

> "Whether the evidence that Rule sold its anchors at prices below its costs, together with direct evidence of Tie Down's initiation of and participation in the Rule/Tie Down plan to put U.S. Anchor out of business within a year, was sufficient (a) to show Defendants' predatory intent; (b) to exclude the possibility that Rule/Tie Down conduct was as consistent with permissible competition as with illegal conduct; and (c) to exclude the possibility that Rule and Tie Down acted independently of one another."

(Brief of Appellee/Cross-Appellant U.S. Anchor Mfg. Inc., p. 1). Notably, Petitioner made absolutely no mention of any "*per se* illegal price-fixing agreement" in the statement of the issues or anywhere else in its appellate brief.

Petitioner's pretrial order submission (R8-273, Attachment C), closing argument (R53-111-112) and response to Respondents' motions for judgment notwithstanding the verdict (R12-355-45,49), as well as the special verdict form (R10-321), also confirm that Petitioner did not try this case on a *per se* illegal price-fixing theory and that Petitioner did not advance this theory on appeal until *after* the Eleventh Circuit rendered opinion. In fact, these portions of the record show that the position taken by Petitioner at trial and in the Eleventh Circuit brief

squarely conflicts with the position now argued in this Court.

This Court often has recognized that arguments which were not timely advanced in the lower courts cannot support a writ for certiorari. *Posters 'n' Things, Ltd. v. United States*, No. 92-903 (U.S. May 23, 1994), Slip Op. 15; *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton*, 428 U.S. at 120. Accordingly, because Petitioner failed to argue at trial or in its appellate brief that this is a price-fixing case involving *per se* rules of antitrust law, Petitioner failed to preserve the conspiracy question for review by this Court.

B. The Eleventh Circuit's Decision On The Conspiracy Claim Is Consistent With Governing Authority.

The Eleventh Circuit's decision on the conspiracy verdict is wholly consistent Supreme Court authority. In discussing the conspiracy claim, the Eleventh Circuit summarized the elements of a conspiracy to restrain trade as "(1) an agreement to enter into a conspiracy (2) designed to achieve an unlawful objective." (Pet. App. 35a). The court also noted that "[f]ederal antitrust law requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately." (Pet. App. 36a). The court then concluded that Petitioner failed to prove its conspiracy claim because there was no evidence that Tie Down knowingly participated in unlawful activity and because

Tie Down's conduct was consistent with legitimate business practices. (Pet. App. 37a-38a).

The Eleventh Circuit's summary of the burden of proving an antitrust conspiracy follows the rulings of this Court in *Matsushita, supra,* and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). In *Monsanto* the Court held that "something more" than price discussions between a manufacturer and distributor must be shown to prove antitrust conspiracy:

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

465 U.S. at 764. Similarly, in *Matsushita,* the Court instructed:

> In *Monsanto,* we emphasized that courts should not permit fact finders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.
>
> * * *
>
> . . . The evidence must "tend to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy.

475 U.S. at 593, 597-98.

Contrary to Petitioner's assertion, moreover, the Eleventh Circuit's decision does not depart from existing law regarding the *per se* illegality of vertical price-fixing agreements. Although the Eleventh Circuit did not expressly consider *per se* liability because Petitioner failed to make this argument before the court rendered its opinion, the Eleventh Circuit's application of the standard quoted above was proper under the facts of this case. Numerous authorities from this Court and the lower courts have held that the mere fact that a manufacturer suggests resale prices which are then implemented by the distributor does not invoke *per se* liability. *Monsanto, supra,* 465 U.S. at 764 n. 9; *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Lewis Service Center Inc. v. Mack Trucks Inc.*, 714 F.2d 842, 846 (8th Cir. 1983); *Carlson Mach. Tools, Inc. v. American Tool Inc.*, 678 F2d 1253, 1261 (5th Cir. 1982); *Chisholm Bros. Farm Equip. Co. v. International Harv. Co.*, 498 F.2d 1137, 1142 (9th Cir. 1974).

As this Court explained in *Monsanto*:

> Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.
>
> * * *
>
> . . . [T]he fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to

> exchange information about the prices and the reception of their products in the market.

Monsanto, 465 U.S. at 761-762. *Per se* liability for vertical price fixing does not arise absent evidence that the manufacturer somehow forced compliance with its suggested resale prices.

> Resale price maintenance of maximum or minimum price is a per se violation of the antitrust laws. [cit.] The mere suggestion of list prices by a manufacturer, however, is not enough to establish the existence of resale price maintenance. [cit.] . . . [R]esale price maintenance must involve making a meaningful event depend on compliance or non-compliance with the "suggested" or "stated price." [cit.] Evidence of exposition, persuasion, argument or pressure on the part of the manufacturer is insufficient without more, to establish coercion required for resale price maintenance.

Carlson Mach. Tools, 678 F.2d at 1261; *see also The Jeanery Inc. v. James Jeans Inc.*, 849 F.2d 1148, 1154 (9th Cir. 1988) ("proof of an agreement must 'include more than a showing that the distributor conformed to the suggested price.' ").

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990), cited by Petitioner, does not state a different rule. Rather, *Atlantic Richfield* addressed a traditional *per se* illegal vertical price-fixing scheme where "resale price maintenance" allegedly resulted from "threats, intimidation and coercion" used by the manufacturer "to secure compliance with its terms." 495 U.S. at 332. *Atlantic Richfield*, therefore, has no application to this case because

there was never an allegation of forced compliance with suggested resale prices.

In this case, the Eleventh Circuit observed that U.S. Anchor failed to adduce any evidence that Tie Down "had any control over Rule's prices." (Pet. App. 13a). In its appellate brief, Tie Down had directed the Eleventh Circuit to undisputed evidence that Rule always exercised independence in setting its resale prices. (R33-187; R34-100; R46-33; R34-35). U.S. Anchor did not challenge this evidence on appeal but rather rested its case on evidence that Tie Down "recommended" that Rule lower its market prices and offered to give Rule discounts in order to allow Rule to compete. (Pet. App. 37a). U.S. Anchor even conceded that Rule charged only three of its customers the low prices described in the "MacKarvich memo." (R34-24; R40-141). Thus, the Eleventh Circuit properly analyzed the conspiracy claim under the rule of reason standard rather than the *per se* standard because of the undisputed evidence that Rule always retained complete independent control over its ultimate resale prices.

C. The Eleventh Circuit Correctly Held That The Particular Evidence In This Case Is Insufficient To Support The Conspiracy Claim.

Petitioner's own expert conceded at trial that Tie Down did not engage in predatory pricing. (R39-153-158). It is undisputed that Tie Down made a profit above its total costs on its anchor sales to Rule during the entire period in question. *Id.*

In an effort to subject Tie Down to liability under a conspiracy theory, Petitioner has mischaracterized the

"MacKarvich memorandum" as a "plan" proposing that Rule set prices at predatory levels in an effort to "force U.S. Anchor to incur losses." (Pet. 5, 9, 13, 18, 20-21). Petitioner also incorrectly asserts that Tie Down and Rule "agreed" to fix Rule's prices at the levels described in the memorandum. *Id.* The Eleventh Circuit reviewed this document in the context of all the evidence and reached a different conclusion. (Pet. 36a-37a).

Petitioner's description of this document ignores the unrefuted testimony that the memorandum was nothing more than a *pro forma* analysis to try to determine whether Petitioner could continue indefinitely to significantly undercut Rule's prices. (R34-15; *see* Pet App. 7a, 14a). The second page of the document demonstrates that it was created only after Rule had lost most of its market share to Petitioner and was based on the assumption that Rule would retain "only 25%" of prior sales. (Pet. App. 104a; *see also* Pet. App. 7a). Moreover, there is absolutely no evidence that Tie Down and Rule "agreed" to fix prices at any level shown in the document. To the contrary, as conceded by Petitioner's appellate brief, Rule made sales to only three of its customers at prices reflected in the memorandum. According to Petitioner, only "40% of Rule's sales were at the lowest level prices proposed by MacKarvich." (Brief of Appellee/Cross-Appellant U.S. Anchor Mfg., Inc., 8). While the underlying data evidenced that actually only 17% of Rule's sales were at these prices, (R34-24, 25, 41-53), even under Petitioner's version of the facts, most of the sales made by Rule were *not* at prices mentioned in the MacKarvich memorandum. As shown above, it is undisputed that

Rule always exercised independence with respect to its ultimate resale prices.

The Eleventh Circuit noted that the MacKarvich memorandum "does not show that Tie Down desired to employ predatory means to drive U.S. Anchor from the market." (Pet. App. 37a). "It says nothing about Rule's costs, and U.S. Anchor does not dispute that Tie Down had no knowledge of Rule's costs other than the price paid for anchors." *Id.* While Petitioner argues that "handling charges" and "label costs" should be added to the alternative prices shown in the MacKarvich memorandum to impute predatory intent to Tie Down, there is no evidence that Mr. MacKarvich ever considered such additional costs when the memorandum was written. The chart found at page 107a of the petition, which adds handling charges and label costs to the anchor prices, was not a trial exhibit but was constructed by counsel in connection with the petition for rehearing in the Eleventh Circuit. More importantly, Petitioner's actual trial exhibits, which were in fact admitted into evidence, show that even after adding handling charges and label costs to the anchor prices actually charged, Rule's revenues always exceeded the total amount paid by Rule to Tie Down. (Compare U.S.T.X. 517, U.S.T.X. 405 and U.S.T.X. 395, *infra* App. 6-App. 9). Thus, Petitioner's own evidence demonstrates that the Eleventh Circuit correctly held that Respondents are entitled to judgment as a matter of law on the conspiracy claim because Tie Down did not knowingly participate in any below-cost pricing scheme.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied in this case.

Respectfully submitted,

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May 27, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

U.S. ANCHOR MFG., INC., Plaintiff, v. RULE INDUSTRIES, INC. and TIE DOWN, INC. a/k/a TIE DOWN ENGINEERING, INC., Defendants, v. WILLIAM CHAPMAN and U.S. ANCHOR MFG., INC., Defendants-in-Counterclaim.	)	CIVIL ACTION FILE NO. 1:86-CV-2447-JTC

JOINT REQUEST TO CHARGE NO. 4

Plaintiff's second antitrust claim is for conspiracy to eliminate a competitor under Section 1 of the Sherman Act. In order to establish such a claim, the Plaintiff must prove:

First, that there was a conspiracy;

Second, that the purpose of the conspiracy was to engage in a common course of anticompetitive conduct;

Third, that the conspiracy produced an adverse impact on the relevant market as an unreasonable restraint of trade; and

Fourth, that the Plaintiff suffered injury as a proximate result of the Defendants' wrongful acts.

I will now explain what I mean by the term "unreasonable restraint of trade." An unreasonable restraint of trade is one which substantially harms competition in the relevant market.

In determining whether defendants' restraint had a substantially harmful effect on competition in the relevant market, you should consider the nature of the restraint, the history of the restraint, the structure of the market, and defendants' position in the market. You should look at such factors as the number of companies or firms in the market, the reasons and the way in which the restraint was imposed, and the nature of the market before and after the restraint was imposed.

You must also consider the extent to which competition was harmed. A restraint that has only a slight or insubstantial impact on competition is not unreasonable or unlawful.

Evidence that defendants' restraint has harmed plaintiff's business is not enough by itself, although that is one relevant factor. Plaintiff must show that the restraint harmed competition in the relevant market, not just that it harmed plaintiff's business.

You should consider defendants' market power and how much of the market was affected by defendants' restraint. If defendants had little market power or defendants' restraint affected only a small part of the market, then it is less likely that defendants' restraint had a substantial effect on the competition in the market. In considering defendants' market power, you may consider defendants' market share, but market share may not always, by itself, show defendants' market power.

You should also consider whether the restraint influenced or affected the price, output, or product quality in the relevant market. Where a restraint does not affect price, output, or product quality, it is not as likely to substantially harm competition as a restraint that does.

In determining whether the restraint was unreasonable, you must also weigh any effects of the restraint which are helpful to competition against any harmful effects. For instance, you should consider whether consumers have benefited from the restraint, whether the restraint has helped the defendants in competing with other products, whether the restraint has helped to avoid unreasonable profiteering by others in the market, etc. All of these may be aspects of the restraint which benefit competition. If the beneficial effects outweigh the harmful effects, or if the net effect on competition is harmful but insubstantial, the restraint is not unreasonable or unlawful.

Finally, you may also consider defendants' purpose in imposing the restraint. A purpose or intent to harm competition, by itself, is not sufficient to establish an unreasonable restraint of trade. However, consideration of the purpose of the restraint may help you in determining if it would likely have a harmful effect on competition. You may consider, for example, whether defendants imposed the restraint to achieve a legitimate business purpose and, if so, whether the restraint was tailored to achieve that legitimate business purpose, or, rather, was broader than necessary.

[*See* Attachment A].

Respectfully submitted,

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ATTACHMENT A TO JOINT
REQUEST TO CHARGE NO. 4

Plaintiff proposes to add the following paragraph to Joint Request to Charge No. 4, at the beginning of page 2:

"To prove that a conspiracy created an unreasonable restraint of trade, it is not necessary to show that the Defendants obtained a monopoly, or that there was a dangerous probability that monopolization would occur."

Defendants object to the inclusion of this paragraph.

PLAINTIFF'S EXHIBIT 395

RULE-SC-86

RULE-SC-86 RULE STANDARD COST 1986

Anchor Model	ANCHOR COST* TDE TO RULE	HANDLING CHARGE CALCULATION	HANDLING CHARGES* TDE TO RULE	LABEL COST* TDE TO RULE	*TOTAL (COLS. B+D+E)*
E-80 (5E)	$2.584	4.46# * 1.15 = 5.13# * $.055 =	$0.282	$0.11	*$2.98*
E-100 (7E)	$3.575	5.43# * 1.15 = 6.24 * $.055 =	$0.343	$0.11	*$4.03*
E-110 (10E)	$4.842	6.09# * 1.15 = 7.00# * $.055 =	$0.385	$0.11	*$5.34*
E-120 (13E)	$6.559	7.75# * 1.15 = 8.91# * $.055 =	$0.490	$0.11	*$7.16*
E-130 (15E)	$7.369	9.09# * 1.15 = 10.45# * $.055 =	$0.575	$0.11	*$8.05*
M-130 (#2.5)	$2.495	3.18# * 1.15 = 3.66# * $.055 =	$0.201	$0.11	*$2.81*
M-240 (#4)	$3.828	4.11# * 1.15 = 4.73# * $.055 =	$0.260	$0.11	*$4.20*
M-480 (#8)	$5.827	8.28# * 1.15 = 9.52# * $.055 =	$0.524	$0.11	*$6.46*
M-740 (#13)	$9.665	13.0# * 1.15 = 14.95# * $.055 =	$0.822	$0.11	*$10.60*
M-1050 (#18)	$12.049	17.40# * 1.15 =20.01# * $.055 =	$1.101	$0.11	*$13.26*
M-1300 (#22)	$16.130	25.75# * 1.15 = 29.61# * $.055 =	$1.629	$0.11	*$17.87*
M-1600 (#40)	$27.056	45.0# * 1.15 = 51.75# * $.055 =	$2.846	$0.11	*$30.01*
M-2400 (#65)	$53.802	72.0# * 1.15 = 82.8# * $.055 =	$4.554	$0.11	*$58.57*
M-2800 (#85)	$82.604	91.0# * 1.15 = 104.7# * $.055 =	$5.756	$0.11	*$88.47*

ANCHOR COST – FINN DOCUMENT (ANCHOR 75)
HANDLING CHARGES – ADDINGTON DOCUMENT (HDLG 6,7)
LABEL COST – ADDINGTON DOCUMENT (WP#CS) AND GREENING EX. #3,#4

P

TIE DOWN ENGINEERING –

RULE INDUST

RULE MODEL NOS: (USA MODEL NOS:)		1985 - 1986 SEASON AVERAGE REVENUE FROM RULE (RULE SC86)	QUANTITY SOLD (ADDING-TON)	TOTAL REVENUE FROM RULE	1986 - 1987 AVERAGE REVENUE FROM RULE (RULE SC87)	QUA SC (ADI TC
E-80	(5E)	$ 2.98	6,448	$ 19,215	$ 2.53	6
E-100	(7E)	4.03	12,039	48,517	3.49	12
E-110	(10E)	5.34	14,939	79,774	4.56	17
E-120	(13E)	7.16	5,328	38,148	6.28	7
E-130	(15E)	8.05	3,097	24,931	7.05	5
M-130	(#21)	2.81	1,670	4,693	2.79	2
M-240	(#4)	4.20	4,941	20,752	4.19	6
M-480	(#8)	6.46	14,000	90,440	6.41	18
M-740	(#13)	10.60	6,529	69,207	10.50	8
M-1050	(#18)	13.26	1,917	25,419	13.07	1
M-1300	(#22)	17.87	1,808	32,309	17.61	1
M-1600	(#40)	30.01	349	10,473	30.11	
M-2400	(#65)	58.57	97	5,681	58.63	
M-2800	(#85)	88.47	44	3,893	84.81	
TOTALS				473,452		

AINTIFF'S EXHIBIT 405

REVENUE ANALYSIS (HOOKER FLUKE ANCHORS)

RIES – STANDARD COST SUMMARY

	SEASON		1987 - 1988 SEASON			1988 - 1989 SEASON	
TITY LD ING- N)	TOTAL REVENUE FROM RULE	AVERAGE REVENUE FROM RULE (RULE SC88)	QUANTITY SOLD (ADDING-TON)	TOTAL REVENUE FROM RULE	AVERAGE REVENUE FROM RULE (RULE SC89)	QUANTITY SOLD (ADDING-TON)	TOTAL REVENUE FROM RULE
15	$ 17,495	$ 2.81	6,631	$ 18,633	$ 3.10	5,554	$ 17,217
31	42,337	3.96	10,902	43,172	4.06	9,357	37,989
05	78,455	5.19	14,880	77,227	5.32	13,680	72,778
32	47,301	6.90	8,639	59,609	7.05	6,985	49,244
79	38,627	7.77	5,382	41,818	7.93	5,529	43,845
09	5,605	3.21	2,493	8,003	3.24	2,272	7,361
05	27,675	4.66	6,934	32,312	4.79	5,929	28,400
97	121,130	5.72	22,943	131,234	5.86	23,343	136,790
17	93,629	9.98	10,078	100,578	10.21	9,745	99,496
56	25,565	11.95	2,718	32,480	12.20	2,918	35,600
57	32,702	15.58	1,888	29,415	16.26	2,011	32,699
28	15,898	37.75	377	14,232	38.71	673	26,052
01	11,785	78.07	106	8,275	71.72	132	9,467
45	12,297	95.08	51	4,849	95.08	12	1,141
	570,501			601,837			598,079

DEPOSITION EXHIBIT

Andrews 53
11/27/90 Rc

RULE INDUSTRIES

(AVERAGE REVENUE/AVERAGE VARIABLE COST/ AVERAGE TOTAL COST)

(HOOKER FLUKE ANCHORS)

1986	Average Revenue Totals (Rule RA)	$ 541,883
1986	Average Variable Cost Totals (Rule AVC 86)	620,532
1986	Average Total Cost Totals (Rule ATC 86)	757,677
1987	Average Revenue Totals (Rule RA)	612,971
1987	Average Variable Cost Totals (Rule AVC 87)	738,264
1987	Average Total Cost Totals (Rule ATC 87)	876,435
1988	Average Revenue Totals (Rule RA)	631,695
1988	Average Variable Cost Totals (Rule AVC 88)	762,290
1988	Average Total Cost Totals (Rule ATC 88)	901,809
1989	Average Revenue Totals (Rule RA)	624,471

1989	Average Variable Cost Totals (Rule AVC 89)	744,058
1989	Average Total Cost Totals (Rule ATC 89)	887,494

(3)

Supreme Court, U.S.
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No. 93-1766

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

U.S. ANCHOR MFG., INC.
Petitioner,

v.

RULE INDUSTRIES, INC.,
TIE DOWN, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

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9pp

TABLE OF CONTENTS

page

INTRODUCTION 1

ARGUMENT 2

I. THE ELEVENTH CIRCUIT APPLIED A 50% MARKET SHARE TEST AND IGNORED THE RULE THAT PRICE FIXING AGREEMENTS ARE *PER SE* ILLEGAL 2

II. THE RECORD CITATIONS RELIED ON BY TIE DOWN WERE NOT RELIED ON BY THE JURY OR THE ELEVENTH CIRCUIT 4

III. TIE DOWN'S PREDATORY PRICING AND RESALE PRICE MAINTENANCE CITATIONS ARE INAPPOSITE 5

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Brooke Group, Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. ___, 113 S.Ct. 2578 (1993) 5

Matsushita Elec. Ind. Co. v. *Zenith Radio*, 475 U.S. 574 (1986) 5

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---

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

Perhaps if the Eleventh Circuit had written the opinion described in Tie Down's brief in opposition, there would be no problem warranting the Court's attention. The brief in opposition fails, however, to come to grips with what the court of appeals' opinion actually says, makes extensive citation to portions of the record that were never cited (much less relied upon) by the Eleventh Circuit, ignores that the jury found against the defendants, and relies heavily on irrelevant predatory pricing and resale price maintenance cases. As a result, the compelling reasons for review advanced in the petition remain unanswered.

ARGUMENT

I. THE ELEVENTH CIRCUIT APPLIED A 50% MARKET SHARE TEST AND IGNORED THE RULE THAT PRICE FIXING AGREEMENTS ARE *PER SE* ILLEGAL

Although it tries valiantly, Tie Down cannot blink the fact that the Eleventh Circuit's attempted monopolization analysis turns on a 50% market share test. As noted in U.S. Anchor's petition, the Eleventh Circuit's opinion briefly acknowledges the well-reasoned cases identifying the range of factors that should be examined other than market share. Pet. 12. But the court of appeals does not accord the slightest weight to the substance of those cases, or to the extensive evidence on the existence of important factors other than market share in this case.

Nowhere does Tie Down — or the Eleventh Circuit — deal with the fact that, as the properly instructed jury was entitled to find, in this duopoly market elimination of U.S. Anchor as a competitor would leave Rule with a commanding share of the relevant market. Instead, what the Eleventh Circuit said, and what its entire attempted monopolization analysis turns on, is this: "because Rule possessed less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success in October 1985 *as a matter of law.*" Pet. App. 34a (emphasis supplied); *see also* Br. Opp. 6-7 (stating that "[t]he Eleventh Circuit held that there was no dangerous probability of success because Rule possessed less than 50% market share . . ."). [1] This is a bright line 50% market share test for

---

[1] Contrary to Tie Down's assertion that this 50% market share test merely conflicts with other decisions of the Eleventh Circuit, as shown in the petition the Eleventh Circuit's holding is in direct conflict with decisions in at least five other circuits, as well as noted academic authorities. Pet. 14-17.

attempted monopolization, and it is the *only* basis stated by the court of appeals for its decision.

Tie Down's effort to rewrite the Eleventh Circuit's conspiracy holding is equally unavailing. Tie Down claims this was not a "price fixing" case, only a "conspiracy to eliminate a competitor" case. Br. Opp. 10. But the only anticompetitive conduct ever at issue in this case was pricing conduct. *See* Pet. App. 88a-89a (trial court's holding, in denying Tie Down's motion for judgment notwithstanding the verdict, that there was sufficient evidence to support a finding of conspiracy and an agreement to form a conspiracy to engage in anticompetitive pricing). As the Eleventh Circuit said, the evidence was "sufficient to show an intent to achieve an unlawful objective on Rule's part, namely the use of predatory means to monopolize the fluke anchor market." Pet. App. 36a.

The predatory means employed by respondents was below cost pricing, so by definition the only Sherman Act Section 1 conspiracy ever at issue was a conspiracy to set prices. *See also* Pet. App. 11a (Eleventh Circuit's finding that "U.S. Anchor also alleged that Rule and Tie Down had conspired to restrain trade in violation of section 1 of the Sherman Act and conspired to attain a monopoly in violation of section 2, by agreeing to charge predatory prices, also beginning in October 1985."). Calling the conspiracy at issue by a more general name does not change what it is. Likewise, trying to take petitioner to task for not making arguments that did not come up until the Eleventh Circuit made its palpably erroneous departure from the *per se* rule in price fixing cases does not change what the Eleventh Circuit did.

II. THE RECORD CITATIONS RELIED ON BY TIE DOWN WERE NOT RELIED ON BY THE JURY OR THE ELEVENTH CIRCUIT

Substantial portions the brief in opposition are devoted to detailed arguments about the record that are more suited to a motion for judgment notwithstanding the verdict than an argument to this Court. This should be recognized for what it is — an attempt to make clean-cut legal problems that *are* in the court of appeals opinion appear "fact-bound" by filling the brief in opposition with extraneous material that *is not* in the opinion. The jury, however, found for U.S. Anchor, and that cannot be changed by anything Tie Down says here. It is U.S. Anchor that is entitled to every benefit of the doubt in the record — a deference to the jury that both Tie Down and the Eleventh Circuit seem at great pains to ignore. Ultimately, Tie Down's extensive citations to the record are all beside the point, because Tie Down does not and cannot show that the Eleventh Circuit's opinion relies upon any of them.[2]

---

[2] It is nonetheless noteworthy that included with the brief in opposition at App. 8 is a table that shows that for each of the years covered by the table (1986 through 1989), Rule's "Average Revenue Totals" were *less than* its "Average Variable Cost Totals" and its "Average Total Cost Totals." Moreover, Tie Down also includes a table, at App. 6, which shows that for seven of the twelve anchors covered by the MacKarvich memo, the prices specified in that memo were below the price charged to Rule by Tie Down, *with or without* the inclusion of handling and labeling charges. *Compare* Br. Opp. App. 6, second and third columns, with Pet. App. 107a, top right-hand column; *see* Pet. 20-21. Even Tie Down's own factual citations show the manifest injustice of the court of appeals' reversal of the jury's verdict.

III. TIE DOWN'S PREDATORY PRICING AND RESALE PRICE MAINTENANCE CITATIONS ARE INAPPOSITE

Contrary to its conspiracy argument, when it suits its purposes Tie Down is only too eager to emphasize the *pricing* practices that gave rise to the complaint. Thus, Tie Down makes an understandable effort to bring this case within the holdings on "recoupment" in *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. ___, 113 S.Ct. 2578 (1993), and *Matsushita Elec. Ind. Co.* v. *Zenith Radio*, 475 U.S. 574 (1986). *See* Br. Opp. 6. The same effort was made below, but the Eleventh Circuit expressly held that: "Our disposition of this case, however, makes it unnecessary to address Rule's recoupment argument." Pet. App. at 34a. Since the Eleventh Circuit did not rely on *Brooke Group* or *Matsushita*, or for that matter any other predatory pricing cases, they have little or no bearing on the petition.

Tie Down's citation to a group of resale price maintenance cases is also wide of the mark. Br. Opp. 13-15. The central issue in all those cases was whether there was sufficient evidence of an agreement. Here, the evidence of agreement was plain — as the jury plainly found. The question now before this Court is whether the Eleventh Circuit was correct in adding new intent and heightened burden of proof requirements to price fixing agreements. This additional requirement finds no support anywhere, and certainly not in resale price maintenance cases. This Court should grant certiorari to correct the Eleventh Circuit's fundamental error, or at a minimum should call for the views of the Solicitor General, who must live with the adverse effects on antitrust enforcement created by the opinion below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 93-1766 (4)

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Respondents.

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TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
INTEREST OF THE AMICI STATES	2
REASONS FOR GRANTING THE WRIT	4
I. The Eleventh Circuit's Determination That The Dangerous Probability Of Success In An Attempted Monopolization Case Is Determined Solely By Market Share Is In Conflict With Decisions By This Court And With Other Circuits	4
II. The Eleventh Circuit's Heightened Standard Of Proof Requirement To Establish A Price Fixing Conspiracy Under Section 1 Of The Sherman Act Conflicts With This Court's Prior Opinions	9
A. This Court Has Not Created A Heightened Standard Of Proof For Contract, Combination Or Conspiracy	10
B. The Eleventh Circuit's Decision Conflicts With This Court's Decisions Holding Price Fixing *Per Se* Illegal	12
C. The Eleventh Circuit's Decision Conflicts With This Court's Standard Of Review For Claims Alleging Pricing At Predatory Levels	13
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	PAGE
Albrecht v. The Herald Co., 390 U.S. 145 (1968)	12
American Tobacco Co. v. United States, 328 U.S. 781 (1946)	5, 10
Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982)	12
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990)	13
Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981)	10
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S.Ct. 2578 (1993)	13, 14
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	10
Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969)	8
Domed Stadium Hotel v. Holiday Inns, 732 F.2d 480 (5th Cir. 1984)	7
Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911)	12
Eastman Kodak Co. v. Image Technical Services, Inc., 112 S.Ct. 2072 (1992)	4, 11
Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940)	12

PAGE

Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) 2

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) 2

Hayden Pub. Co. v. Cox Broadcasting Corp., 730 F.2d 64 (2d Cir. 1984) 7

In re Insurance Antitrust Litigation, 113 S.Ct. 2891 (1993) 3

International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786 (2d Cir. 1987) 8

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) 12

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Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 11

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Movie 1 & 2 v. United Artists' Communs., 909 F.2d 1245 (9th Cir. 1990) 7

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New York v. Hendrickson Bros., Inc., 840 F.2d 1065 (2d Cir. 1988) 3

PAGE

New York v. Nintendo of America, Inc., 1992-2 Trade Cas. [CCH] ¶ 69,513 (S.D.N.Y. 1991) 3

New York v. Primestar Partners, L.P., No. 93 Civ. 3868 (S.D.N.Y. Final Judgment Sept. 14, 1993).. 3

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Reazin v. Blue Cross & Blue Shield of Kansas, 899 F.2d 951 (10th Cir 1990)..... 7

Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., 783 F.2d 159 (10th Cir. 1986) 9

Spectrum Sports, Inc. v. McQuillan, 113 S.Ct. 884 (1993) 4, 6

Swift & Co. v. United States, 196 U.S. 375 (1905) 5, 6

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United States v. General Dynamics Corp., 415 U.S. 486 (1974) 5, 6

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United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 12

PAGE

United States v. Trenton Potteries Co., 273 U.S. 392 (1926) 10

United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) 6

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Statutes

15 U.S.C. § 1 ..... *passim*

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15 U.S.C. § 15c 2

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Respondents.

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BRIEF OF AMICI CURIAE STATES OF NEW YORK, ALABAMA, CONNECTICUT, FLORIDA, INDIANA, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, OHIO, PENNSYLVANIA, RHODE ISLAND, TENNESSEE, TEXAS, VIRGINIA AND WISCONSIN

INTRODUCTION

The States of New York, Alabama, Connecticut, Florida, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia and Wisconsin (hereinafter "Amici States") submit this brief in support of the petitioner's positions that:

1. In an attempted monopolization case under Sherman Act section 2, 15 U.S.C. § 2, a determination that the defendant did not have a 50% or greater share of the relevant market does not, as a matter of law, preclude a finding of dangerous probability of monopolization without regard to evidence concerning concentration in the relevant market, barriers to entry, defendant's capacity to cross-subsidize predation and any other relevant factors.

2. Establishing the requisite combination, contract, or conspiracy under Sherman Act section 1, 15 U.S.C. § 1, in a claim alleging an agreement to restrain trade by fixing prices that the petitioner charges are predatory, does not require antitrust plaintiffs to meet a heightened standard of proof on the issue of whether or not there was agreement.

INTEREST OF THE AMICI STATES

The Amici State Attorneys General are the chief law officers of their states and are charged with the duty to enforce the antitrust laws. The Attorneys General represent the citizens of their states as *parens patriae* in bringing federal antitrust actions for damages and injunctive relief.[1] They also represent the interests of the states and their political subdivisions in a proprietary capacity in federal antitrust actions, also for treble damages and injunctive relief. The Attorneys General are the primary public enforcers of their respective state antitrust laws, which are frequently interpreted in conformity with the Sherman Act. The states play a significant role in antitrust enforcement and thus have a substantial interest in ensuring that the federal antitrust laws are interpreted

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[1] 15 U.S.C. § 15c, known as the Hart-Scott-Rodino Antitrust Act, authorizes state Attorneys General to represent all natural person citizens of their states in antitrust actions under the Sherman and Clayton Acts and to recover treble damages; *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945) (common law *parens patriae*); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

in accordance with the underlying Congressional policy, the prior decisions of this Court and sound competition policy.

The Attorneys General also have a vital interest in preventing an unwarranted narrowing of the definition of the dangerous probability of success element in attempted monopolization cases. State Attorneys General have brought significant multistate cases against firms for monopolization and attempted monopolization.[2] Additionally, the proper standard for proving a contract, combination or conspiracy under section 1 of the Sherman Act is of great concern to the Attorneys General. Individually and collectively, the Amici States have brought numerous actions under section 1, or analogous state antitrust statutes, challenging horizontal and vertical agreements to fix prices and restrain trade.[3] The position adopted by the Eleventh Circuit could, by raising the standard of proof of the agreement element, protects anticompetitive conduct. Such a result would allow anticompetitive conduct that harms the Amici States and their consumers to flourish.

The Amici States are committed to ensuring that their citizens and governmental entities enjoy the benefits of free competition. The issues involved in this case are of major importance to the promotion of competition. For the reasons stated herein, the Amici States urge this Court to grant the petition for a writ of certiorari.

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[2] *New York v. Primestar Partners, L.P.*, No. 93 Civ. 3868 (S.D.N.Y. Final Judgment Sept. 14, 1993) (45 states and District of Columbia challenged, under Sherman Act sections 1 and 2, alleged restraints on the development of direct satellite broadcast of programming); *New York v. VISA U.S.A., Inc.*, CV-89-5043 (PNL) (S.D.N.Y. Final Order 1990) (14 states challenged, under Sherman Act sections 1 and 2 and Clayton Act section 7, a joint venture by potential issuers of point of sale debit cards).

[3] *E.g., In re Insurance Antitrust Litigation*, 113 S.Ct. 2891 (1993); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988); *Maryland v. Mitsubishi Electronics America, Inc.*, 1992-1 Trade Cas. [CCH] ¶ 69,743 (D.Md. 1992); *New York v. Nintendo of America, Inc.*, 1992-2 Trade Cas. [CCH] ¶ 69,513 (S.D.N.Y. 1991).

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Determination That The Dangerous Probability Of Success In An Attempted Monopolization Case Is Determined Solely By Market Share Is In Conflict With Decisions By This Court And With Other Circuits

The Eleventh Circuit failed to follow the teaching of this Court's most recent attempted monopolization case, *Spectrum Sports*, 113 S.Ct. 884 (1993), which requires an analysis of the defendant's actual economic power in a market, contrary to the Eleventh Circuit's mechanistic application of market share screens.[4]

The elements of attempted monopolization are (1) a specific intent to monopolize a relevant market, (2) predatory or exclusionary conduct to accomplish the result and (3) a dangerous probability of success. *Spectrum Sports, Inc. v. McQuillan*, 113 S.Ct. 884 (1993); *Loraine Journal v. United States*, 342 U.S. 143 (1951).

In assessing whether the petitioner had met its burden of proving that the respondent had a dangerous probability of successful monopolization, the Court of Appeals held:

> Accordingly, because [respondent] Rule possessed less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success in October 1985 as a matter of law.

Pet. App. 34a.

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[4] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072, 2082 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

This requirement of a specific market share is in conflict with the decisions of this Court and with other Circuits.[5] As this Court has made clear, in order to demonstrate that the defendant has a dangerous probability of succeeding in its monopolistic goal, the plaintiff must define the relevant market and show that the defendant has some power in that market.[6] *Spectrum Sports*, 113 S.Ct. at 890 (1993). Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Although "[t]he existence of [monopoly] power ordinarily may be inferred from the predominant share of the market," *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), share of the market is not the only relevant factor in determining whether market power exists. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (Clayton Act section 7 case).[7]

Moreover, in an attempted monopolization case, the plaintiff is not required to show that the defendant actually possessed monopoly power, only that it had a dangerous probability of achieving it. *Swift & Co. v. United States*, 196 U.S. 375 (1905); *American Tobacco Co. v. United States*, 328

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[5] The Eleventh Circuit failed to follow its own precedent concerning attempted monopolization, *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) (Recognizing that barriers to entry and other factors are relevant.).

[6] P. Areeda & D. Turner, III *Antitrust Law* ¶ 835a at 346 (1978) (the "dangerous probability" element "does not require significant preexisting market power" but simply a finding that the market share plus the anticompetitive conduct "may result in monopoly.").

[7] "In applying the statutory language that is the basis of relevant product market analysis, the Supreme Court has expressly stated that there is no distinction between 'line of commerce' of § 7 of the Clayton Act, 15 U.S.C. § 18 (1976), and 'part of commerce' of § 2 of the Sherman Act, 15 U.S.C. § 2. *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966)." Robert L. Hubbard, Note, *Potential Production: A Supply Side Approach for Relevant Product Market Definitions*, 48 Ford. L. Rev. 621, 622 n.6 (1980).

U.S. 781, 785 (1946).[8] A defendant may be liable for attempted monopolization even though the attempt did not succeed. *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985) (defendant liable for attempted monopolization by inviting another competitor to fix prices, though the plan was impossible to execute because the invitee did not agree).

The defendant's market share is *a* factor relevant to the third element of the offense of attempted monopolization, that is, whether or not there is a dangerous probability that the attempted monopolization is likely to succeed. However, a firm's market share alone does not necessarily provide an accurate picture of its power in the relevant market. Market shares must be viewed in the context of "a company's future ability to compete." *General Dynamics Corp.*, 415 U.S. at 501-02. Similarly, in last term's section 2 case, this Court stated "demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Spectrum Sports*, 113 S.Ct. at 892 (1993). Share of a relevant market is one, but not the sole, indicator of economic power in a market.[9] Other critical factors, including barriers to new entry, *United States v.*

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[8] "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Swift*, 196 U.S. at 396 (citation omitted).

[9] In resolving market or "monopoly" power issues, the courts have typically relied on market definition and on the defendant firm's share of the market thus defined. . . . Nevertheless, market definition has one serious limitation as a method for determining market power.

. . . .

United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), and the competitive structure of the industry, *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948),[10] must be considered in assessing whether market share is an accurate representation of market power.

The Eleventh Circuit's adoption of a 50% market share screen for attempted monopolization cases thus conflicts with the letter and spirit of prior decisions of this Court concerning the weight and use of market share data. The decision also conflicts with decisions of other circuits holding that a defendant's market share is an inadequate measure of its market power and that a review of other factors in section 2 cases is required.[11] Thus, the Fifth Circuit, *Domed Stadium Hotel v.*

> All methods of power assessment raise difficult problems of proof and judgment. Market definition (and its resultant market-share calculation) has the additional disadvantage of being insufficient to establish the degree of market power that a firm possesses. One could have a substantial degree of market power even though he accounts for well below 100 percent of sales of a specified product. And the power of a firm accounting for, say, 80 percent of sales of a particular product may be very high or negligible, depending upon the demand for the product and upon the supply elasticity of existing competitors and the intensity of barriers to entry by others.

P. Areeda & D. Turner, II *Antitrust Law* ¶ 507 at 330 (1978) (footnote omitted).

[10] "The relative effect of the percentage command of a market varies with the setting in which that factor is placed." *Columbia Steel* at 528.

[11] Moreover, the Eleventh Circuit set the minimum market share above the levels that have been accepted by other Courts of Appeal as sufficient to prove actual, as compared to attempted, monopolization. *Movie 1 & 2 v. United Artists' Communs.*, 909 F.2d 1245 (9th Cir. 1990) (possession of 45% to 70% could indicate monopoly power, and 70% and 90% shares of relevant markets at a minimum raised a question of fact); *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951 (10th Cir 1990) (45% to 60% market share does not prohibit a finding of monopoly power as a matter of law); *Hayden Pub. Co. v. Cox Broadcasting Corp.*,

Holiday Inns, 732 F.2d 480, 490 (5th Cir. 1984), noted that "a share of less than the fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present."[12] *See also, Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 991 (5th Cir. 1983) (Defendant liable for attempted monopolization though its market share dropped from 80% to about 38%). Similarly, the Second Circuit has adopted a host of factors that must be considered in addition to the defendant's share of the market. *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987). These "market characteristics" include "the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand." *Id.* at 792.[13] The Sixth Circuit, in *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983), employed a similar comprehensive analysis rather than relying solely upon market share. The court stated that the test of dangerous probability of success "clearly mandates a comparison of the defendant's size, performance and policies to that of other competitors *and* analysis of the market structure." *Id.* at 507 (emphasis in original). The Sixth Circuit specifically cited two factors as important to analyzing whether a defendant is

730 F.2d 64 (2d Cir. 1984) (stating that a party may have monopoly power in a market although its share of the market was less than 50%).

[12] The Fifth Circuit has also observed that courts "must be particularly wary of the numbers game of market percentage when considering an 'attempt to monopolize' suit." *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969).

[13] In an actual monopolization case, the Second Circuit stated that "We do not doubt the significance of market share evidence as an indicator of either the presence or absence of monopoly. As the cases and commentators have cautioned, however, the true significance of market share data can be determined only after careful analysis of the particular market." *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 128 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981).

"seeking to monopolize the older, dying, smaller market" or is "an emerging competitor in the new, developing, larger market." *Id.* These factors include the ease with which new competitors could enter the market and any past or recent changes in the structure of the industry. Finally, the Tenth Circuit, too, has demanded consideration of all relevant factors, including "number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, consumer sensitivity to change in prices, innovations or developments in the market, whether the defendant is a multimarket firm, as well as other evidence." *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986).

II. The Eleventh Circuit's Heightened Standard Of Proof Requirement To Establish A Price Fixing Conspiracy Under Section 1 Of The Sherman Act Conflicts With This Court's Prior Opinions

The Eleventh Circuit's second error was in changing the settled law of the proof required to establish an antitrust conspiracy, creating an unprecedented "heightened standard" for cases that include, but are not necessarily limited to, allegations of agreements to restrain trade by fixing prices at levels alleged to by predatory, in violation of Sherman Act section 1, 15 U.S.C. § 1.

The Court of Appeals did not cite controlling authority for its "heightened standard" of proof. The court stated:

> . . . there is insufficient evidence linking Tie Down to Rule's efforts to support a finding of conspiracy between them. Federal antitrust law requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately. . . . *see also Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 764 (1984) U.S. Anchor did not meet this heightened standard of proof."

Pet. App. 36a.

The Eleventh Circuit failed to identify what "lower" standard against which it compared the "heightened" standard for federal antitrust conspiracies. Moreover, the Eleventh Circuit referred to only part of the *Monsanto* language, ignoring this Court's full statement that an agreement may be proved by "direct or circumstantial evidence that reasonably tends to prove that the [conspirators] had a conscious commitment to a common scheme designed to achieve an unlawful end." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). If the Eleventh Circuit's adoption of a "heightened standard" is not corrected, it may affect future Sherman Act section 1 conspiracy cases, which represent the majority of antitrust cases brought by Attorneys General, especially in the Eleventh Circuit.

A. This Court Has Not Created A Heightened Standard Of Proof For Contract, Combination Or Conspiracy

It is axiomatic that the elements of a Sherman Act section 1 violation include (1) a contract, combination or conspiracy among two or more entities, (2) that unreasonably restrains trade, and (3) affects interstate or foreign commerce.[14] ABA Antitrust Law Section, I Antitrust Law Developments 3d 2 (3d ed. 1992).

An antitrust conspiracy is "a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement," *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Such illegal conspiracies may be express, *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), or implied, *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966).

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[14] In addition, the plaintiff must demonstrate "antitrust injury", that its injury was caused by conduct that the antitrust laws were enacted to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

To the extent that the Eleventh Circuit believed that *Monsanto* announced a new, heightened, standard for proof of conspiracy in antitrust cases, it is simply wrong. In *Monsanto*, this Court held that "[t]he correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768. On a motion for summary judgment, this Court explained that the plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. . . . [R]espondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of competing inferences of independent action or collusive action that could not have harmed respondents." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Finally, this Court has stated that *Matsushita's* requirement "that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases", noting that the requirement "was not invented, but merely articulated, in that decision." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 U.S.2072, 2083 (1992).[15]

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[15] Moreover, antitrust scholars Areeda and Hovenkamp state:

> It is important not to be misled by *Matsushita's* statement, which restated *Monsanto*, that the plaintiff's evidence, if he is to prevail, must "tend . . . to exclude the possibility that the alleged conspirators acted independently." The Court surely did not mean that the plaintiff must disprove all non-conspiratorial explanations for the defendants' conduct. Not only did it use the word "tend," but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable factfinder to infer that the conspiratorial explanation is more likely than not.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1405 at 1021 (1993 Supp.). In adopting the heightened standard of proof, the Eleventh Circuit evidently was misled to misinterpret this Court's precedents.

Here, the jury could have found such an agreement in evidence of respondent Tie Down's written proposal that respondent Rule cut prices to cause petitioner U.S. Anchor to incur losses, Rule's implementation of those prices and sales at prices below its costs, according to the record. Pet. App. 8a, 107a.

B. The Eleventh Circuit's Decision Conflicts With This Court's Decisions Holding Price Fixing *Per Se* Illegal

Per se illegal restraints of trade are those which are so unambiguously anticompetitive that they are illegal as a matter of law. Stating that horizontal price fixing agreements had been "unlawful *per se*" for more than 40 years, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940), this Court held that "[a]ny combination which tampers with price structures is engaged in an unlawful activity. . . . Congress has not left with us the determination of whether or not particular price schemes are wise or unwise, healthy or destructive."

Neither the reasonableness of the prices fixed, nor the alleged intentions, nor any alleged business reasons for the conspiracy are defenses to price fixing. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-49 (1982); *Socony-Vacuum*, 310 U.S. at 222-24; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461 (1940). Prices are fixed, within the prohibition of the Sherman Act, "because they are agreed upon." *Socony-Vacuum*, 310 U.S. at 222.

Vertical price fixing has been *per se* unlawful for more than 80 years, *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

Minimum, as well as maximum, price fixing is *per se* illegal. *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968) (adhering to *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), and holding that maximum retail price fixing is as unlawful as minimum resale price fixing.);

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (assuming arguendo that maximum resale price fixing is *per se* illegal).

C. The Eleventh Circuit's Decision Conflicts With This Court's Standard Of Review For Claims Alleging Pricing At Predatory Levels

In this case, the anticompetitive conduct alleged to violate section 1 of the Sherman Act was an agreement to restrain trade by fixing prices, which the plaintiff alleged were set at predatory levels. The Eleventh Circuit held that there is a heightened standard for proof of conspiracy in such cases, which specifically required evidence that both of the conspirators knew that the prices set were actually predatory in order to have conspired. In so holding, the Court of Appeals incorrectly merged two of the elements of a Sherman Act section 1 violation: whether there was an agreement and whether that agreement unreasonably restrained trade. As the Amici States have discussed, above, the jury found that the petitioner presented evidence sufficient for it to find a conscious commitment to a common scheme, an agreement, satisfying the first element of a section 1 cause of action. *See* Pet. App. 87a.

The second element of the section 1 cause of action is whether or not the agreement is an unreasonable restraint of trade. The Court of Appeals found that the evidence considered by the jury was "sufficient to show an intent to achieve an unlawful objective on Rule's part, namely, the use of predatory means to monopolize the fluke anchor market." Pet. App. 36a. In its most recent case concerning predatory pricing, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578 (1993), this Court enunciated the requirements for proving claims concerning predatory pricing.[16] This Court concluded that "[t]hese prerequisites to

[16] Two elements are required to prove a Section 2 predatory pricing claim: (1) the predator's prices must be below an appropriate measure

recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury." *Brooke Group*, 113 S.Ct. at 2589. The Eleventh Circuit's "heightened standard" for proof of agreement to restrain trade by fixing prices at levels alleged to be predatory is just such an artificial obstacle; a standard designed to defeat such claims rather than the essential component of actual market injury required by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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of its own costs, and (2) the plaintiff must show that the predator has a "dangerous probability of recouping its investment in below cost prices." *Brooke Group*, 113 S.Ct. at 2587-88 (1993).